Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.* MEMBERS OF THE NEVADA STATE ASSEMBLY AND NEVADA STATE SENATE,*

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the effective nullification of a key, recently-enacted structural provision of the Nevada State Constitution violates the Republican Guarantee Clause of Article IV of the United States Constitution?

2. Whether *federal* due process imposes *any* limits on a state court's ability to "interpret" its own state constitution and, if so, whether due process is violated by the Nevada State Supreme Court decision granting a remedy that no party had requested, which effectively nullified a structural provision of the State's Constitution and violated several well-established canons of constitutional construction?

3. Whether deeming a bill raising taxes as "passed" by simple majority vote rather than the 2/3 vote required by an amendment to the Nevada Constitution dilutes the votes of legislators and their constituents and nullifies the votes of those who supported the state constitutional amendment, in violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, Members of the Nevada State Assembly; Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington, Members of the Nevada State Senate

Respondents: Hon. Kenny Guinn, Governor of the State of Nevada; The Legislature of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Hon. Bernie Anderson, Hon. Morse Arberry, Jr., Hon. Kelvin D. Atkinson, Hon. Barbara E. Buckley, Hon. Vonne S. Chowning, Hon. Jerry D. Claborn, Hon. Tom Collins, Hon. Marcus Conklin, Hon. Jason Geddes, Hon. Dawn Gibbons, Hon. Chris Giunchigliani, Hon. David Goldwater, Hon. Josh Griffin, Hon. Joe Hardy, Hon. William C. Horne, Hon. Ellen M. Koivisto, Hon. Sheila Leslie, Hon. Mark A. Manendo, Hon. Kathy McClain, Hon. Bob McCleary, Hon. Harry Mortenson, Hon. John Oceguera, Hon. Genie Ohrenschall, Hon. David R. Parks, Hon. Peggy Price, Hon. Wendell P. Williams, Members of the Nevada State Assembly; Hon. Lorraine T. Hunt, President of the Senate; Hon. Terry Care, Hon. Maggie Carlton, Hon. Bob Coffin, Hon. Bernice Mathews, Hon. Joseph M. Neal, Jr., Hon. William J. Raggio, Hon. Raymond D. Rawson, Hon. Michael Schneider, Hon. Raymond C. Shaffer, Hon. Dina Titus, Hon. Randolph Townsend, Hon. Valerie Wiener, Members of the Nevada State Senate.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Less then eight years ago, the voters of Nevada overwhelming amended their state Constitution to restrict their Legislature from raising taxes without a 2/3 vote in each house. This past July, in response to an extraordinary suit brought by the Governor of Nevada against the Legislature, the Nevada Supreme Court issued an even more extraordinary order, directing the Legislature to ignore that constitutional provision, not because it violated any federal constitutional right, but simply because it had proved an impediment to the Legislature's ability to adopt appropriations larger than the existing revenue streams would support. The court reached its conclusion by what can only be described as a complete and willful disregard for the language and structure of the Constitution and for virtually every single cannon of

constitutional construction heretofore guiding Nevada judicial functions. The decision stands as an unvarnished usurpation of the authority of the Nevada Constitution, a shameful violation of the judicial oath, and a repudiation of the principle that Nevada's is a government of laws rather than men.

This Court in *New York v. United States* recognized that attempts by state governmental officials to alter "the form or the method of functioning" of the state government might well give rise to a justiciable Republican Guarantee Clause challenge. 505 U.S. 144, 186 (1992). This case presents such a viable challenge if ever a case did. Particularly when considered together with the significant vote dilution, vote nullification, and due process claims that Petitioners raised below, claims which, like the Republican Guarantee Clause claim itself, go to the very essence of republican self-government, a writ of certiorari is warranted to review (and reverse) the egregious disregard of the people's will manifested in the opinion of the Nevada Supreme Court below.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada, dated July 10, 2003, is reported at 71 P.3d 1269 (Nev. 2003) and is reproduced at pages 1a-22a of the appendix to this petition ("Pet. App."). That Court's order denying Petitioners' motion for rehearing, dated September 17, 2003, is reported at 76 P.3d 22 (Nev. 2003) and is reproduced at Pet. App. 23a-50a. There are no opinions from the Nevada trial or intermediate appellate courts, as Respondent Governor Guinn brought his petition for a writ of mandamus against the Nevada Legislature directly to the Nevada Supreme Court under that court's original jurisdiction.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Nevada ordering the Legislature of Nevada to consider tax increases "under

simple majority rule" rather than the 2/3 vote required by the Nevada Constitution was entered on July 10, 2003. The court denied a petition for rehearing on September 17, 2003—Constitution Day. A timely request for extension, filed on December 4, 2003, was granted by Justice O'Connor on December 8, 2003, extending the time in which to file this petition until January 17, 2004, and thus to January 20, 2004 by operation of Rule 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guarantee Clause of Article IV, § 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, § 18 of the Nevada Constitution, adopted by voter initiative in 1996, provides, in relevant part:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

> 3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.

Article 9, § 2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, § 2 of the Nevada Constitution, adopted in 1864, provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, ...

Article 11, § 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

STATEMENT OF THE CASE

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of 2/3 of the Members of each house of the Legislature. Nev. Const. Art. 4 § 18(2). Tax measures that do not receive the necessary 2/3 vote may still be adopted, but must be submitted to the voters for approval before they can take effect. *Id.* § 18(3).

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn, the lead Respondent here, proposed to the Legislature a budget which included a $980 million tax increase, Pet. App. 7a, 32a, by far the most massive tax increase in the State's history. Unable to garner the 2/3 vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution. Pet. App. 7a, 32a. Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a couple of education funding bills.

Because the Nevada Constitution mandates a balanced budget, and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature that was anywhere near the amounts proposed was going to require a

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[1] Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections.

tax increase of somewhere between $800 and $900 million. The Legislature could not consider reductions elsewhere in the budget because the Governor's special session proclamation did not give the Legislature such authority, and the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved. *See* Nev. Const. Art. 5, § 9 ("the Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened"); Pet. App. 34a. The Nevada Assembly was unable to muster a 2/3 vote for any of the tax increases that reached the Assembly floor, either during the 19th Special Session or the 20th, convened by the Governor on June 25, 2003, although it was widely believed that a smaller tax increase would receive the necessary 2/3 vote. *See* Pet. App. 36a ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase").

Minutes after midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn brought suit against the Nevada Legislature and every one of its Members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase and thereby balance the budget and fund education by the means he had proposed but for which he had been unable to obtain the constitutionally-required level of support.

A group of legislators—Petitioners here—field a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could also consider reductions in the spending increases already approved. Pet. App. 36a. Roughly fifty different organizations and individuals filed nearly a dozen *amicus curiae* briefs either in support of or opposition to the Governor's petition.

On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "simple majority rule" rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution, Pet. App. 6a, 14a, unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation, Pet. App. 15a (Maupin, J., dissenting). Although the court acknowledged the constitutional validity of the 2/3 vote provision of Article 4, § 18(2), it found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. And although the 2/3 vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education." Pet. App. 6a.

Three days later, on Sunday, July 13, the Nevada Assembly conducted a floor vote on Senate Bill 6 ("SB6"), a bill that sought to increase taxes in the State by $788 million. Although the bill failed to garner the 2/3 vote required by Article 4, § 18(2), the Speaker of the Assembly gaveled the bill "passed." The next morning, the legislative Petitioners here, joined by individual citizens, taxpayers, trade groups and tax policy organizations, filed suit in the United States District Court for the District of Nevada, contending that the Assembly's action amounted to vote dilution and vote nullification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and ignored the structural commands of the state Constitution in violation of the Republican Guarantee Clause of Article IV, § 4 of the United States Constitution. Although the district court, sitting *en banc*, granted plaintiffs request for a temporary re-

straining order that same day, by week's end it held that it was without jurisdiction to consider the legislators' claims under the *Rooker-Feldman* doctrine and dismissed the action. *Angle v. Legislature of State of Nevada*, 274 F.Supp. 2d 1152, 1155 (D. Nev. July 18, 2003). The district court suggested that the *Rooker-Feldman* doctrine also barred the claims of the non-legislators, but dismissed those claims under Rule 12(b)(6), without prejudice to re-filing in state or federal court. *Id.*, at 1156.[2]

Late in the evening of the next day, a Saturday, with the TRO lifted, the Nevada Assembly proceeded to consider another bill raising taxes, Senate Bill 5 ("SB5"). SB5 also failed to garner a 2/3 vote, but the Assembly Speaker nevertheless deemed the bill "passed," this time over a point of order objection that, in violation of parliamentary procedure, he refused to submit to a requested roll-call vote of the body.

The following Monday, July 21, 2003, the group of Legislators—again, Petitioners here—filed a Petition for Rehearing with the Nevada Supreme Court requesting that the court reconsider its ruling and recall its writ of mandamus. Pet. App. 51a-74a. Petitioners specifically raised the federal vote dilution, vote nullification, due process and Republican Guarantee Clause claims that are the subject of this petition for a writ of certiorari. Pet. App. 66a-73a. The group of Legislators also filed an application for an emergency stay, which the court set over for additional briefing and did not decide until summarily denying it on September 17, 2003. The citizens and taxpayers who had joined them in the federal action filed a motion to intervene on July 21, 2003, seeking to present their federal claims to the Nevada Supreme Court as well. That motion was denied less than an hour

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[2] The federal action is currently pending before the Ninth Circuit Court of Appeals, focusing on the *Rooker-Feldman* jurisdictional issue.

later, in an order hurriedly signed by only four of the court's seven Justices.

Late that evening, by its own account because of the changed dynamic in the Legislature produced by the Nevada Supreme Court's writ of mandamus, the Nevada Legislature adopted tax legislation by a two-thirds supermajority, in conformity with the Nevada Constitution. Pet. App. 27a-28a. Although Petitioners then filed a motion to vacate the Nevada Court's original decision on the Nevada equivalent of *Munsingwear* grounds, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *City of Las Vegas v. Sunward Sales, Inc.*, 843 P.2d 1207, 1208 (1982), the Nevada Supreme Court refused. It denied the petition for rehearing as moot and also summarily denied the motion to vacate on September 17, 2003. Pet. App. 45a, 47a n.46. Justice Maupin, dissenting, would have granted the petition for rehearing, dissolved the mandamus, and vacated the prior majority opinion.

REASONS FOR GRANTING THE WRIT

Briefly stated, this Court's review is warranted because, as described in Part I below, the extraordinary writ issued by the Nevada Supreme Court violated the Republican Guarantee Clause of Article IV of the United States Constitution, and diluted the votes of Legislators and their constituents, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Although Petitioners first raised those claims in their petition for rehearing before the Nevada Supreme Court, this Court has jurisdiction where, as here, the federal issues arose as the result of an unexpected decision by a state's highest court and petitioners therefore had no prior opportunity to raise the federal claims. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). The Nevada Supreme Court's refusal even to address, much less put to rest, Petitioners' significant federal claims, in the context of its extraordinary or-

der for the state Legislature to ignore a key structural provision of the state Constitution, presents important questions of federal constitutional law that have not been, but should be, addressed by this Court.

Relying on the Nevada Supreme Court's extraordinary decision, the Nevada Assembly twice deemed as "passed" tax increases that failed to receive the 2/3 vote required by the Nevada Constitution. As will be discussed at greater length in Part II, *infra*, the fact that the Legislature ultimately achieved a 2/3 majority on another tax bill does not render this case moot. First, the Nevada Supreme Court's decision remains on the books, where it will continue to affect the dynamic in the Legislature, "authorize" unconstitutional vote dilution, and undermine the structural limits imposed by the people of Nevada. Second, the Nevada Assembly already took unconstitutional action in reliance on the decision below, violating federal constitutional rights of Petitioners and their constituents. Third, voluntary cessation of unlawful conduct does not moot a case where the actor remains free, as here, to begin the unlawful conduct anew. Moreover, even if legislative approval of a tax increase somehow mooted Petitioners' challenge to the ongoing effects of the Nevada Supreme Court decision authorizing such conduct, the unlawful vote dilution is certainly capable of repetition yet evading review. Finally, had the case truly become moot in the midst of petitioners' effort to have the Nevada Supreme Court address the significant violations of federal constitutional rights caused by its decision, the proper course for the Nevada Supreme Court would have been to vacate its decision. That it chose not to confirms not only the lingering effect of the decision, but also the court's intent to have such an effect.

I. The Nevada Supreme Court's Order, and Subsequent Action by the Assembly in Reliance on It, Violated Fundamental Federal Constitutional Rights that Require this Court's Protection.

Most fundamentally, the writ of mandamus issued by the Nevada Supreme Court directing the Legislature to ignore a key structural provision of the Nevada Constitution altered the way the Nevada Legislature has been authorized by the people of Nevada to do business, in violation of the federal constitutional guarantee that the people may choose the particulars of their republican form of government. Moreover, the manner in which the court reached its decision, granting a remedy never requested by any party and ignoring or misapplying its own well-established canons of construction, raises serious due process concerns.

The specific actions taken under the supposed "authority" of the decision below resulted in the unconstitutional dilution of Petitioners' votes when, on July 13, 2003 and again on July 19, 2003, the Nevada Assembly deemed as "passed" a bill increasing taxes without the 2/3 vote required by the Nevada Constitution. Derivatively, the actions by the Assembly, again under the "authority" of the decision below, diluted the representation to which the constituents of Petitioners were entitled by the clear command of the Nevada Constitution and effectively nullified the votes of the hundreds of thousands of Nevada citizens who in 1994 and 1996 overwhelming approved the 2/3 vote provision as an amendment to their state Constitution. These actions violate voting rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Because of the strength and significance of these claims, which were never addressed by the Nevada Supreme Court below (nor by the district court in the parallel federal action, which held it was jurisdictionally barred), this Court's review is now warranted.

A. Republican Guarantee Clause Claim

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 183 (1992). "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing *L. Tribe, American Constitutional Law* 398 (2d ed. 1988); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, and n., 122-123 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-289, 300 (1972); D. Merritt, 88 Colum. L. Rev. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962)).

In the wake of this Court's decision in *New York*, several lower courts have acknowledged that the Republican Guarantee Clause might present justiciable questions, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in the cases. *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995). Others, in conflict, have held that Republican Guarantee Clause claims remain

nonjusticiable. *See State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997).

This case presents one of the rare instances in which a Republican Guarantee claim must be viable. The essence of the republican guarantee is the right of a State's citizens to "structure their government as they see fit." *Kelley*, 69 F.3d, at 1511. In *New York* itself, this Court dismissed the Guarantee Clause claim only because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government." 505 U.S., at 186. But here, the decision below has already altered "the method" by which the Legislature functions when undertaking to impose new or increased taxes. Such claims should be viable under *New York*, and have specifically been recognized as viable in the Third and Fifth Circuits. *See Texas*, 106 F. 3d, at 667; *New Jersey*, 91 F.3d, at 468-69; *cf. Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999) (noting that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee"), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

The receptiveness of these courts to Republican Guarantee Clause claims for structural constitutional violations stands in stark contrast to the treatment afforded the claim by the Nevada Supreme Court below. Indeed, the Nevada Court's order was such an extraordinary departure from the judicial office, that one can hardly imagine a more apt case for pressing a Republican Guarantee Clause claim than this.

"We must accept the duly enacted constitution and laws of this state, whether they are well or ill advised ...." That statement, which captures the essence of the federal guarantee that the people may choose the particulars of the republican form of government under which they wish to live, was surprisingly made not by Justice Maupin in dissent but by Justice Shearing in her opinion concurring in the denial of

the petition for rehearing below. Had Justice Shearing and her colleagues paid heed to her own admonition, the State of Nevada would not be in the midst of the constitutional crisis that it is.

Instead, the majority of the Nevada Supreme Court, the Governor of the State, and a majority of the State's Legislature refused to accept the clear, unambiguous and perfectly constitutional command of the Nevada Constitution that had twice been approved by the overwhelming majority of Nevada voters.

This was no mere state court interpretation of ambiguous state law, which as a general rule is beyond the supervisory authority of this Court. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000). No; the Nevada Supreme Court candidly admitted that the 2/3 vote provision was unambiguous, that it was validly enacted, and that it did not violate any command of the federal Constitution. *See, e.g.*, Pet. App. 8a, 10a, 12a. The court's ensuing cavalier treatment of a binding state constitutional amendment, however, undermines government by consent, which is the essence of the guarantee of republican government.

B. Due Process Violations

Not surprisingly, a decision such as the Nevada Supreme Court's below that undermines the very notion of constitutional government also violates the commands of federal due process, particularly where, as here, the Court ordered a remedy that had not been requested by any party. State courts simply do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process. *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000). The Nevada Supreme Court's decision is thus susceptible to—and, given the seriousness of the threat to constitutionalism, warrants—this Court's review.

1. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party.

One of the most curious aspects of the Nevada Supreme Court's decision was that no party ever asked the court to invalidate Art. 4 § 18(2) or even to suspend its operation in this session.[11] Justice Maupin, in dissent, expressly noted without contradiction that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today." Pet. App. 15a. The Governor, too, admitted during the parallel proceedings in the federal District Court that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." *Angle*, Governor's Opp. Br., at 6. The remedy was raised for the first time by the Nevada Court's decision, without argument or hearing, contrary to the most basic precepts of due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (holding that parties need "to know the issues on which decision will turn and to be apprised of the factual material" so that they may rebut claims against them) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

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[11] Although an *amicus* brief of the NEA questioned whether this state constitutional provision violated the federal Constitution, the court did not decide the case based on the federal constitutional issues presented by those *amici*. To do so, moreover, would have been procedurally improper, for a number of reasons. Even assuming NEA had been granted leave to file its brief, *amici* cannot raise new issues on their own. The parties were not called on to brief the *amici*'s points. Although the Court ordered the Governor and other counter-respondents to respond to the counter-petition filed the same day as the *amicus* brief, no response was ordered to any issues raised by the *amici*.

2. "Unconstitutional" constitutional amendments

The Nevada Court gave life to the old law-school hypothetical notion of "unconstitutional constitutional amendmens." The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended. *See, e.g.*, Walter F. Murphy, THE NATURE OF THE AMERICAN CONSTITUTION (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 380 (1995). Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, this is not the case. Unlike the examples typically used in the hypothetical context—separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments—the Nevada Supreme Court here *rejected*, rather than protected, a structural provision in favor of a non-structural one.

3. Canons of Construction

As expressly noted by Petitioners in their petition for rehearing below, Pet. App. 64a, the Nevada Supreme Court also ignored or misapplied a number of longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with "unclean hands."

The Nevada Court's utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them in this particular case surely must warrant this Court's consideration.

Last In Time Prevails. Nevada has long subscribed to the interpretative canon that "if there is an irreconcilable conflict between two statutes, the statute which was most recently enacted controls the provisions of the earlier enactment." *Marschall v. City of Carson*, 464 P.2d 494, 500 (Nev. 1970) (citing, e.g., *State ex rel. Eggers v. Esser*, 129 P. 557 (Nev. 1913)).

Nevada applies the same rules of construction when construing constitutional provisions that it applies when construing statutes. *Nevada Mining Ass'n v. Erdoes*, 26 P.3d 753, 757 (2001). Indeed, in the context of constitutional provisions, the "last in time" principle is more than just an interpretive canon; it is compelled by the very nature of constitutional government and the recognition in the Declaration of Independence that governments are established by the consent of the governed. Decl. of Ind. ¶ 2; *see also* Nevada Enabling Act, 13 Stat. 30 (1864) (requiring conformity with the principles of the Declaration). As a result, the Nevada Supreme Court has given the principle particularly strong application in the context of constitutional provisions:

> [I]t is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail.

Whitehead v. Nevada Commission on Judicial Discipline, 878 P.2d 913, 938 (Nev. 1994) (citing *Schick v. United States*, 195 U.S. 65, 68-69 (1904)).

That "oxymoronic" proposition is precisely the holding of the Nevada Supreme Court below. Although the Court did not go so far as to actually declare the 2/3 vote provision *unconstitutional*, as some of the *amici* had urged, Pet. App. 40a, it did deprive the provision of any effect, which is even worse, for it effectively negated a duly-enacted act of the people without even the pretense of a holding of unconstitutionality: "Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties." Pet. App. 45a.

Specific provisions prevail over general. The Nevada Supreme Court sought to avoid the clear import of the last-in-time rule by manufacturing a new rule of interpretation that "substantive" provisions trump "procedural" provisions of the Constitution. Although it attempted to portray that new rule as of a piece with the longstanding rule that general provisions must yield to specific provisions, Pet. App. 11a, the court's new dichotomy was actually a bastardization of the older rule, treating a core structural provision of the State's Constitution as a mere "procedural" rule and treating as "specific" the very general provision that "the legislature shall provide for [the] support and maintenance [of at least one common school in each district] by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law." Pet. App. 12a; Nev. Const. Art. 11, §§ 2, 6. Indeed, had it looked to the "specific" requirements of the education provisions, it would have been immediately apparent that the only obligation is to fund a limited number of schools for half a year; a requirement that could easily have been met with the approximately $700 million already available in the budget without need for

further appropriations and without conflict with the exceptionally specific requirement that new taxes be approved by a 2/3 vote.

Under the court's new reasoning, other "procedural" provisions of the Nevada Constitution are just as susceptible to judicial nullification as was the 2/3 vote provision, including the requirement of bicameralism, presentment, the 120-day restriction on legislative sessions, and even the limitation on matters that can be considered in special session. *See* Nev. Const. Art. 4, §§ 2, 18(1), 35; Art. 5, § 9. The Nevada Supreme Court has already acknowledged that these provisions, too, contribute to the supposed conflict between the 2/3 tax provision, on the one hand, and the education funding and balanced budget provisions, on the other. Pet. App. 33a (noting that other problems contributing to the conflict included the "abbreviated nature of the legislative session" and "policy disagreements between the Senate and Assembly").

These provisions are every bit as "procedural" and "general," in the Nevada Supreme Court's newly manufactured hierarchy of constitutional commands, as was the 2/3 vote provision. The Senate had already voted to approved the tax increase by the requisite 2/3 vote, so the bill could have been deemed as "passed" by the Nevada Court without any Assembly input to avoid the "conflict" between the "general" bicameralism provision and the "specific" education funding provision. Indeed, the Court could just as easily have ordered the Legislature to ignore the requirement of Article 4, Section 19, which bars the State Treasurer from releasing funds without a legislative appropriation.

Such absurdities are no different than the court's nullifying the 2/3 requirement for new taxes, which represents, more than anything else, an abandonment of constitutional government and a court run amok.

Reconcile conflicting provisions. Another long-standing interpretive canon followed in Nevada is that, whenever pos-

sible, courts are to interpret rules or statutes in harmony with other rules and statutes. Pet. App. 11a (citing *Bowyer v. Taak*, 817 P.2d 1176, 1177 (1991)). Indeed, the Nevada Court has frequently noted that it is "obligated" to reconcile conflicting provisions to the maximum extent possible. *Id.*; *Weston v. Lincoln County*, 643 P.2d 1227, 1229 (Nev. 1982).

The Nevada Supreme Court here disregarded several obvious means of reconciling the supposed conflict between the 2/3 vote provision, on the one hand, and the balanced budget and education funding provisions, on the other. It refused Petitioners' request to remit the matter back the Governor, who possessed the power to expand his special session proclamation to permit the Legislature to consider spending reductions, which very likely would have solved the impasse. It broadly read the education provisions to mandate a level of funding that necessitated a tax increase beyond the level for which there was the support of 2/3 of the Legislature, when nothing in those clauses remotely suggests any specific level of funding. Indeed, the only requirement is found in Art. 11, § 2, which mandates only that the Legislature provide one school in each district for a minimum of six months each year—a mandate that was easily met without violating the 2/3 vote provision. Neither of these obvious ways of reconciling the supposed conflict was considered by the court,[3] which instead simply rendered nugatory the later-enacted 2/3 vote provision.

Unambiguous Provisions. Finally, the Nevada Court gave only lip service to a key restriction on the judicial role that it has in the past repeatedly applied:

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[3] A third alternative, resort to Article 4, section 18(3), which specifically provides that tax increases failing to garner a 2/3 vote could nevertheless take effect if approved by a simple majority of the voters, was completely discounted by the Court as "inadequate." Pet. App. 10a n.12.

> Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.

State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 995 P.2d 482, 485 (Nev. 2000).

Despite its own repeated treatment of the 2/3 vote provision as "clear on its face," the Nevada Supreme Court looked beyond the clear text to other materials to try and ascertain a different voter intent, concluding, essentially, that the voters were too ignorant to have understood what effect the initiative would actually have on the functioning of state government. Pet. App. 31a.

"Unclean Hands." The Nevada Supreme Court has long subscribed to "the well-established defense to equitable claims that litigants seeking equity must come with 'clean hands.'" *Tracy v. Capozzi*, 642 P.2d 591, 593 (Nev. 1982).

Here, the legislative standstill that led Governor Guinn to invoke the equity jurisdiction of the Nevada Supreme Court was at least in part of his own making, the result of his refusal to expand his special session proclamation to permit the Legislature to consider reductions in previously-approved appropriations. Petitioners' counter-petition, asking the Nevada Supreme Court not to consider the Governor's petition because of the Governor's unclean hands, was denied; the Court inexplicably asserted that it had "no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse." Pet. App. 9a n. 9. Such faux concern for separation of powers presents particularly bitter irony given the court's ensuing disregard for Nevada's Constitution.

By such cavalier disregard of, and contempt for, unambiguous voter will, the Nevada Supreme Court substituted its

judgment for that of the voters. By itself, that undermines republican government. Joined with the other canons of construction disregarded by the court below, due process also was violated to such a degree as to warrant this Court's attention.

C. Legislator Vote Dilution Claims

This Court has expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes"). At issue in *Coleman* was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the State was permitted to cast a vote in the event of a tie. As the Court noted, "the twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.*, at 441; *cf. Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "the harm worked by [a rule changing the amount of votes necessary to pass legislation]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent, as is the command of the Constitution that we remedy that harm").

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a state legislature's failure to comply with its own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway* v. *Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes

for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)).

Moreover, this Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of *state law*. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if ... state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was legally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id.*

The hypothetical case described in *Bender* is nearly identical to the case here. State law—Article 4, § 18(2) of the Nevada Constitution—authorizes legislative action on tax increases "solely" by 2/3 vote. The disenfranchised legislators—Petitioners here, who together provided enough votes to defeat the tax increase pursuant to the 2/3 vote requirement of Article 4—claimed in their petition for rehearing that their vote was diluted below the weight required by state law. Under the provisions of the Nevada Constitution, the vote of a Member of the State Assembly is 1/15 of the votes necessary to defeat a tax increase. Under the procedure "authorized" by the Nevada Supreme Court's decision below, an Assemblyman's vote was only 1/21 of the votes necessary to defeat a tax increase—a classic case of vote dilution, in vio-

lation of the Due Process Clause. This Court should grant certiorari in this case to consider what was only *dicta* in *Bender*, and to address the implicit split on this issue between the Nevada Supreme Court in this case, on the one hand, and the Fourth and Ninth Circuits and the District of Vermont, in *Richardson, Rea*, and *Conway*, respectively, on the other.

D. Constituent Representation Dilution Claims

This Court has repeatedly recognized vote dilution claims by voters. *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). "'[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

That the dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d, at 834. As the D.C. Circuit noted in *Michel*: "It could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor." 14 F.3d, at 626. Depriving voters of representation with the full weight guaranteed their representatives' votes by the Nevada Constitution's 2/3 requirement is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

Here, by operation of Article 4, § 18(2) of the Nevada Constitution, Petitioners' constituents were entitled to representation with a vote sufficient to block a tax increase unless supported by 2/3 of the legislature. The Nevada Supreme Court's order "authorizing" the Legislature to ignore that constitutional provision, and to deem as "passed" a tax in-

crease that failed to garner the necessary 2/3 vote, diluted the representation to which Petitioners' constituents were entitled, and therefore diluted their right to vote.

The Nevada Supreme Court's decision below thus is fundamentally in conflict with well-established precedent of this Court, and in conflict with holdings of the D.C. Circuit in *Michel* and *Skaggs*. Certiorari is warranted.

E. Vote Nullification Claims

The Nevada Supreme Court's decision has also effectively nullified the votes successfully cast in support of the Gibbons Constitutional Tax Initiative in 1994 and 1996, by which an overwhelming percentage of Nevadans approved the 2/3 vote amendment to the state Constitution. The right to vote constitutes more than just the right to show up at a voting booth. It encompasses the right to have that vote counted and, if successful, to have the results of the vote given effect. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

In authorizing the Nevada Legislature to adopt tax increases by "simple majority rule," the Nevada Supreme Court essentially treated the successful vote for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Nevada Supreme Court's decision deprived Nevada voters of their right to an effective vote, a right protected by the Fourteenth Amendment of the U.S. Constitution.

In addition, the Court's mandamus essentially authorized the State Assembly to give greater—indeed dispositive—weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and

disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966)).[4]

Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the Nevada Supreme Court's order is clearly contrary to the decisions of this Court and certiorari is warranted.

II. The Legislature's Adoption of a Tax Bill Did Not Moot this Case, and the Nevada Court's Refusal to Vacate Its Decision Only Perpetuates the Ongoing Republican Guarantee Problem.

The Nevada Court denied the petition for rehearing on mootness grounds, but because the Legislature's adoption of a tax bill did not moot this case, that erroneous decision does not present a vehicle problem to this Court's review.

There are several reasons why the case is not moot. First, the decision "authorizing" the Legislature to ignore the 2/3 vote provision of the Nevada Constitution remains on the books, where it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Second, the Assembly already took action on two bills, SB5 and SB6, in violation of the 2/3 vote provision. That the Legislature ultimately approved another bill by a 2/3 vote does not alter the vote dilution that occurred with respect to those bills.

Third, a case is not rendered moot by the voluntary cessation of complained-of conduct. When a party ceases

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[4] The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S., at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

wrongful action, but remains able to repeat it in the future, the controversy remains alive and subject to adjudication. Thus, "however much the new regulation may reduce the practical importance of this case, it does not completely remove the controversy." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

The Nevada Supreme Court itself acknowledged not just the possibility, but the likelihood, that the Legislature again will again ignore the 2/3 vote provision: "Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed." Pet. App. 33a n.15. So did Senator Dina Titus, one of the Respondents here: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling." Las Vegas Sun (July 12, 2003). And the Nevada State Education Association ("NSEA"), one of the Governor's *amici* below, made the same point. In its brief opposing Counter-Petitioners' motion to vacate, the NSEA contended—repeatedly—that the Nevada Supreme Court should *not* vacate its decision precisely because the legislative stand-off that resulted from the 2/3 vote requirement of the Nevada Constitution was so capable of repetition every budget cycle. NSEA Br. at 5 (noting that the damage allegedly inflicted upon school districts by the 2/3 vote provision "has not somehow been undone by the recent passage of the school funding bill"); *id.* at 6 ("The [July 10] opinion should not be withdrawn, because the crisis that precipitated it is otherwise likely to recur"); *see also* NSEA Initial Br. at 6 n.7 ("it is *highly probably* that this [legislative] session will not be the last in which the Gibbons initiative will result in a budget crisis" (emphasis added)).

Even if this case were moot despite the Legislature's voluntary cessation, those same concessions demonstrate that the case is capable of repetition yet evading review, an exception to the mootness bar. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Moreover, the Nevada Court's holding of mootness, based on action by Respondents, deprived Petitioners of the ability to challenge the Court's decision via their petition for rehearing. Vacatur of the decision was thus required under the Nevada equivalent of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Sunward Sales*, 843 P.2d, at 1208 (1982) ("we must dispose of the entire proceeding, not merely the appeal" when new legislation makes a case moot); *see also De La Teja v. United States*, 321 F.3d 1357, 1364 (11th Cir. 2003) ("when an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court's order that addresses it"). The Nevada Supreme Court's refusal to vacate its decision in accord with its customary practice thus causes ongoing harm and exacerbates the due process problems, leaving in place a decision that concededly will continue to undermine a key structural limitation that the citizens of Nevada have imposed on their government.

CONCLUSION

The decision below has generated "public outrage" among Nevada citizens, as well it should, given the court's contempt for its own citizens and the Constitution they have established to reign in their government. *See, e.g.*, Martha Bellisle, "Activists want to oust justices who set Legislature back to work," Reno Gazette-Journal (July 18, 2003).[5]

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[5] Available at http://www.rgj.com/news/printstory.php?id=47301 (last visited Jan. 19, 2004) (noting the "public outrage").

Whether or not their anger ever erupts in a way comparable to Shay's Rebellion or the Whisky Rebellion, which gave rise to the protections of the Republican Guarantee Clause of Article IV, it is critically important that this Court issue a writ of certiorari to review the Nevada Supreme Court's decision. A judicial insurrection such as that manifested by the decision below may well be even more dangerous to the principles of republican government than the insurrections of farmers and debtors that gave the framers of our Constitution such cause for concern.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 20, 2004.

APPENDICES

Appendix A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Honorable Kenny GUINN,

Governor of the State of Nevada,

Petitioner,

v.

The LEGISLATURE Of The STATE OF NEVADA; Honorable Lorraine T. Hunt, President of the Senate; Honorable Richard D. Perkins, Speaker of the Assembly; Mark E. Amodei, Senator; Terry Care, Senator; Maggie Carlton, Senator; Barbara Cegavske, Senator; Bob Coffin, Senator; Warren B. Hardy, Senator; Bernice Mathews, Senator; Mike McGinness, Senator; Joseph M. Neal, Jr., Senator; Dennis Nolan, Senator; Ann O'Connell, Senator; William J. Raggio, Senator; Raymond D. Rawson, Senator; Dean A. Rhoads, Senator; Michael Schneider, Senator; Raymond C. Shaffer, Senator; Sandra Tiffany, Senator; Dina Titus, Senator; Randolph Townsend, Senator; Maurice Washington, Senator; Valerie Wiener, Senator; Bernie Anderson, Assemblyman; Walter Andonov, Assemblyman; Sharron E. Angle, Assemblywoman; Morse Arberry, Jr., Assemblyman; Kelvin D. Atkinson, Assemblyman; Bob Beers, Assemblyman; David Brown, Assemblyman; Barbara E. Buckley, Assemblywoman; John C. Carpenter, Assemblyman; Vonne S. Chowning, Assemblywoman; Chad Christensen, Assemblyman; Jerry D. Claborn, Assemblyman; Tom Collins, Assemblyman; Marcus Conklin, Assemblyman; Jason Geddes, Assemblyman; Dawn Gibbons, Assemblywoman; Chris Giunchigliani, Assemblywoman; Pete Goicoechea, Assemblyman; David Goldwater, Assemblyman; Tom Grady, Assemblyman; Josh Griffin, Assemblyman; Don Gustavson, As-

semblyman; Joe Hardy, Assemblyman; Lynn C. Hettrick, Assemblyman; William C. Horne, Assemblyman; Ron Knecht, Assemblyman; Ellen M. Koivisto, Assemblywoman; Sheila Leslie, Assemblywoman; R. Garn Mabey, Jr., Assemblyman; Mark A. Manendo, Assemblyman; John A. Marvel, Assemblyman; Kathy McClain, Assemblywoman; Bob McCleary, Assemblyman; Harry Mortenson, Assemblyman; John Oceguera, Assemblyman; Genie Ohrenschall, Assemblywoman; David R. Parks, Assemblyman; Peggy Pierce, Assemblywoman; Rod Sherer, Assemblyman; Valerie Weber, Assemblywoman; and Wendell P. Williams, Assemblyman,

Respondents.

Lynn Hettrick; Garn Mabey; Bob Beers; Valerie Weber; Chad Christensen; Walter Andonov; David Brown; Sharron Angle; Don Gustavson; John Marvel; John Carpenter; Pete Goicoechea; Rod Sherer; Tom Grady; Ron Knecht; Barbara Cegavske; Mike McGinness; Ann O'Connell; Sandra Tiffany, and Maurice Washington, Members of the Legislature of Nevada,

Counter-Petitioners,

v.

Honorable Kenny Guinn, Governor of the State of Nevada, and the Legislature of the State of Nevada,

Counter-Respondents.

No. 41679.

July 10, 2003

Original petition for a writ of mandamus compelling the Legislature to fulfill its constitutional duties by a time certain and counter-petition for a writ of mandamus compelling the Governor to call a special session to consider the entire budget.

Petition granted in part as to the Legislature of the State of Nevada; petition denied as to the Lieutenant Governor and the individual members of the Legislature; counter-petition denied.

Brian Sandoval, Attorney General, and Jeff E. Parker, Solicitor General, Carson City, for Petitioner and Counter-Respondent.

Brenda J. Erdoes, Legislative Counsel, Carson City, for Respondents.

Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd., and Mark E. Amodei, Carson City, for Respondents Care and Amodei.

Barbara E. Buckley, Carson City, in Proper Person.

Beckley Singleton, Chtd., and Daniel F. Polsenberg and Beau Sterling, Las Vegas, for Counter-Petitioners.

Jeffrey S. Blanck, General Counsel, Washoe County School District, Reno; Walther Key Maupin Oats Cox & LeGoy and Michael E. Malloy, Reno, for Amicus Curiae Washoe County School District.

Dyer, Lawrence, Penrose, Flaherty & Donaldson and Michael W. Dyer, Carson City, for Amici Curiae Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County, and Washoe Education Association.

Ellsworth Moody & Bennion, Chtd., and Keen L. Ellsworth, Las Vegas, for Amicus Curiae Nevada Congress of Parents and Teachers Association.

C.W. Hoffman Jr., General Counsel, Las Vegas, for Amicus Curiae Clark County School District.

Law Offices of Thomas D. Beatty and Thomas D. Beatty, Las Vegas, for Amici Curiae Clark County Association of School Administrators, Washoe County Education Administrators, and Nevada Association of School Administrators.

McCracken Stemerman Bowen & Holsberry and Richard G. McCracken, Las Vegas, for Amici Curiae Nevada State AFL-CIO and Nevada State Employees Association, AFSCME, Local 4041.

McDonald Carano Wilson LLP and John J. Laxague, Michael A.T. Pagni, Jeffrey A. Silvestri and Thomas R.C. Wilson II, Reno, for Amici Curiae Nevada Taxpayers Association, Associated Builders and Contractors-Sierra Nevada Chapter, AGC Nevada, Nevada Association of Mechanical Contractors, Sierra Chemical Company, Polymer Plastics Corporation, Bath Electronics, EDAWN/ Western Nevada Development Authority, Nevada Consumer Finance Corporation, Nevada Petroleum Marketers and Convenience Store Association, Cal-Neva Franchise Owners Association, 7-Eleven Franchise Owners Association of Southern Nevada, Nevada Resident Agents Association, Monte L. Miller and Joshua C. Miller, Nevada Bankers Association, Nevada Manufacturers Association, Nevada Motor Transport Association, Retail Association of Nevada, Tiberti Fence Company, Carson City Chamber of Commerce, Las Vegas Chamber of Commerce, Nevada Franchised Auto Dealers Association, Nevadans for Real Tax Fairness, Household International, Nevada Corporate Headquarters--Cort Christie, Robert List, Henderson Chamber of Commerce, Thomas Powell, Pic-Mount Imaging, Corp., Phoenix Holdings of Nevada, Inc., Nevada Association of Independent Businesses, Chain Drug Council of Nevada, and Grocery Industry Council of Nevada.

Thomas J. Ray, General Counsel, Las Vegas, for Amicus Curiae University and Community College System of Nevada.

James T. Richardson, Reno, for Amicus Curiae Nevada Faculty Alliance.

Layne T. Rushforth, Las Vegas, for Amicus Curiae Nevada Concerned Citizens.

Wilson & Barrows and Stewart R. Wilson, Elko; Gregory T. Broderick, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

BEFORE THE COURT EN BANC.

OPINION

By the Court, AGOSTI, C.J.:

The Governor of Nevada has petitioned this court for a writ of mandamus declaring the Legislature to be in violation of the Nevada Constitution, and compelling the Legislature to fulfill its constitutional duty to approve a balanced budget —including an annual tax to defray the state's estimated expenses for the biennium beginning July 1, 2003, and appropriations to fund public education during that fiscal period— by a time certain. We agree that our intervention is appropriate in this extraordinary circumstance.

The Legislature failed to fund education in the 72nd Regular Session and in two special sessions and is evidently in a deadlock over the means of raising the necessary revenues. As a result, Nevada's public educational institutions are in crisis because they are unable to proceed with the preparations and functions necessary for the 2003-2004 school year.

It is apparent that the Legislature has failed to fulfill its constitutional mandate because of the conflict among several

provisions of the Nevada Constitution. Therefore, we, in our judicial role as interpreters of the Nevada Constitution, must reconcile the provisions which cause the present crisis. Because we conclude that the individual legislators and the Lieutenant Governor have not violated their constitutional duties, we deny the petition as to them as individuals. We grant the petition as to the Legislature as a body. We order the Legislature to fulfill its obligations under the Constitution of Nevada by raising sufficient revenues to fund education while maintaining a balanced budget. Due to the impasse that has resulted from the procedural and general constitutional requirement of passing revenue measures by a two-thirds majority, we conclude that this procedural requirement must give way to the substantive and specific constitutional mandate to fund public education. Therefore, we grant the petition in part and order the clerk of this court to issue a writ of mandamus directing the Legislature of the State of Nevada to proceed expeditiously with the 20th Special Session under simple majority rule.

DISCUSSION

The Governor filed this writ petition after the Legislature failed to approve a balanced budget before the start of fiscal year 2004, which started on July 1, 2003. The Governor is responsible for the faithful execution[1] of the state's laws and is also responsible for proposing a state budget and submitting it to the Legislature.[2] Pursuant to Article 9, Section 2 of our Constitution, the Legislature is responsible for approving a balanced budget. Also, Article 11, Section 6 of our Constitution compels the Legislature to support and maintain the public school system.[3] The Legislature must appropriate the

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[1] Nev. Const. art. 5, § 7.

[2] *Id.* art. 4, § 2(3).

[3] Nev. Const. art. 11, § 6 provides that "[i]n addition to other means provided for the support and maintenance of [the state] university and com-

money needed for all state government expenditures and provide for an annual tax to defray the state's estimated expenses for the two fiscal years following its regular biennial session.[4] Fiscal year 2004 began on July 1,[5] yet the Legislature has thus far failed in its obligation to support and maintain the public school system. No money has been appropriated to fund this constitutionally mandated obligation. Our Constitution's Article 4, Section 19 provides that the State Treasurer cannot release general funds from the state treasury without specific legislative appropriation.

The Governor began the 2003 legislative session with a request for $980 million in new revenues to balance his proposed budget for the 2003-2005 biennium. The Legislature did not fund education in its 72nd Regular Session, which ended on June 3, 2003,[6] but, after making substantial cuts in the Governor's budget, appropriated $3,264,269,361 for various government functions. The Governor signed these appropriations into law.[7] Existing revenues are expected to meet these appropriations.

Since the conclusion of the Legislature's general session, two special sessions have been convened. On June 3, 2003, the Governor convened the Legislature in the 19th Special Session to appropriate funds for the K-12 school system and to provide an adequate tax plan to provide for funding. The Legislature failed to reach an agreement on a tax plan. The

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mon schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund."

[4] Nev. Const. art. 9, § 2(1) provides that "[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year."

[5] Nev. Const. art. 9, § 1.

[6] Nev. Const. art. 4, § 2(2) limits the regular session to 120 days.

[7] All but three sections of this law took effect on July 1, 2003. Two provisions took effect on June 3, 2003, and one other will take effect on July 1, 2004. 2003 Nev. Stat., ch. 328.

Governor adjourned the 19th Special Session at the request of the Senate Majority Leader and the Speaker of the Assembly on June 12, 2003. That same day, the Governor convened the Legislature for a second special session to begin on June 25, 2003. The Legislature convened, but had not passed a bill to raise the required revenues for the educational system by the start of the new fiscal year, July 1, 2003. The Senate and Assembly recessed by mutual consent, because of their inability to pass a revenue measure by a two-thirds majority.

Since its enactment in 1864, the Nevada Constitution has required a simple majority of each house to pass a bill or joint resolution.[8] Article 4, Section 18(1) provides that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution." In 1993, the Legislature rejected a resolution that proposed to amend the Constitution to create an exception to the simple majority rule and require a two-thirds majority of each house to increase existing taxes or impose new taxes. Ultimately, by initiative, the citizens accepted an identical proposal as a constitutional amendment. The constitutionally required second vote on the initiative occurred in 1996, at a time when the state enjoyed a budget surplus and public sentiment strongly favored restricted tax increases. Article 4, Section 18(2) of our Constitution now requires a two-thirds vote of each house "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates."

In 1997, 1999 and 2001, the Legislature was able to work within these new constraints without major difficulties be-

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[8] *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 837 (Andrew J. Marsh off. rep., 1866).

cause the state operated under a budget surplus and no major tax increases required a vote in the Legislature. By 2003, however, the state's economic picture had changed drastically. The Legislature, faced with a rapidly increasing population, a substantial budget deficit and record-high needs, was unable to reach a two- thirds majority and left its constitutional obligations unfulfilled.

The Legislature's failure to fulfill its constitutional duties by the beginning of the new fiscal year has precipitated an imminent fiscal emergency.[9] Nevada now faces an unprecedented budget crisis. Schools have not been funded for the upcoming school year. Teachers have not been hired. Educational programs have been eliminated. Planning for the academic year is not possible, and the state's bond rating may be jeopardized. This court has been petitioned to resolve the crisis. In light of the above circumstances, it appears there is no plain, speedy and adequate remedy in the ordinary course of law, and this court's intervention is warranted.[10]

At the heart of this case is the two-thirds supermajority requirement for revenue-raising legislation. The Legislature is unable to fulfill its constitutional duties to fund the public schools and to adopt a balanced budget because it has not met the two-thirds vote requirement. The Legislature's failure to provide funds for public education, to pass the concomitant revenue generating package and to balance the

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[9] Some of the pleadings argue that no emergency exists because the Governor and Legislature have methods of providing for education. We have no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse.

[10] Nev. Const. art. 6, § 4; NRS 34.160 (providing that a writ of mandamus may issue to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station); NRS 34.170 (stating that a writ of mandamus may issue when there is no plain, speedy and adequate remedy in the ordinary course of law).

state's budget after having had the opportunities of one general session and two special sessions to do so, leads us to the inevitable conclusion that it is futile to order the Legislature to debate further within the parameters of Article 4, Section 18(2). As constitutional construction is purely a province of the judiciary,[11] we undertake to resolve the tension between the Legislature's constitutional obligation to fund public education and the constitutional provisions requiring a simple majority to enact appropriations bills but a two-thirds majority to generate or increase public revenue to fund those appropriations.[12]

Clearly, this court has no authority to levy taxes or make appropriations. Only our Legislature has been given the constitutional mandate to make appropriations, levy taxes, and to balance the state's budget.[13] However, when constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another, this court must exercise its judicial function of interpreting the Constitution and attempt to resolve the problem.

When construing constitutional provisions, we apply the

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[11] *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 178, 2 L.Ed. 60 (1803); *State of Nevada v. Rosenthal,* 93 Nev. 36, 41, 559 P.2d 830, 834 (1977).

[12] We note that Article 4, Section 18(3) allows a simple majority of each legislative house's members to refer to the people any measure that creates, generates, or increases revenue. Under this section, however, the referral may only be made at the next general election, which will not occur until November 2004. NRS 293.12755. This sixteen-month delay renders any remedy under Section 18(3) inadequate, given the immediacy of the fiscal and educational crises facing our state.

[13] Nev. Const. art. 3, § 1 (providing for separation of powers); *id.* art. 4, § 1(vesting state's legislative authority in Senate and Assembly); *id.* art. 4, § 18; *id.* art. 9, § 2.

same rules of construction used to interpret statutes.[14] Our task is to ascertain the intent of those who enacted the provisions at issue, and "to adopt an interpretation that best captures their objective. We must give words their plain meaning unless doing so would violate the spirit of the provision."[15] Whenever possible, we construe provisions so that they are in harmony with each other.[16] Specific provisions take precedence over general provisions.[17] Finally, constitutional provisions should be interpreted so as to avoid absurd consequences and not produce public mischief.[18]

Nevada's Constitution clearly expresses the vital role that education plays in our state in Article 11. Of particular importance are Sections 1, 2, and 6. Section 1 mandates:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.

Section 2 mandates:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year ... and the legislature may pass such laws as will tend to secure a general atten-

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[14] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001).

[15] *Id.*

[16] *See Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *see also People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152,493 P.2d 880, 886 (1972).

[17] *SIIS v. Surman*, 103 Nev. 366, 368, 741 P.2d 1357, 1359 (1987).

[18] *State v. Brodigan*, 44 Nev. 306, 311, 194 P. 845, 846-47 (1921).

> dance of the children in each school district upon said public schools.

And Section 6 requires the Legislature to provide for the support and maintenance of the public schools. Our Constitution's framers strongly believed that each child should have the opportunity to receive a basic education.[19] Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.

When a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield. Here, the application of the general procedural requirement for a two-thirds majority has prevented the Legislature as a body from performing its obligation to give life to the specific substantive educational rights enunciated in our Constitution. We agree with the Wyoming Supreme Court that "[c]onstitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights."[20] It is paramount that we give Section 18(2) a construction that will preserve the basic right of education.[21] Other states with constitutional provisions similar to ours have also given significant import to the educational clauses of their constitutions.[22]

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[19] See Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 567-72 (Andrew J. Marsh off. rep., 1866).

[20] *Campbell County School Dist. v. State,* 907 P.2d 1238, 1264 (Wyo.1995); *see also Washakie Co. Sch. Dist. No. One v. Herschler,* 606 P.2d 310 (Wyo.1980).

[21] *See Montana Power Co. v. Public Service Com'n,* 305 Mont. 260, 26 P.3d 91, 96 (2001) (stating that constructions which preserve constitutional rights are paramount).

[22] *See, e.g., Brigham v. State,* 166 Vt. 246, 692 A.2d 384, 391- 95 (1997); *Lake View Sch. Dist. No. 25 v. Huckabee,* 351 Ark. 31, 91 S.W.3d 472,

Our Legislature has failed to accomplish its constitutionally mandated tasks of funding Nevada's public education system and balancing the budget. In order to allow the Legislature to fulfill its constitutional mandate in this regard, the general language of Section 18(2) must give way to the simple majority requirement of Article 4, Section 18(1) in order that the specific provisions concerning education are not defeated.

Based upon the Legislature's failure over the last several weeks to fund the constitutionally mandated arena of education, we observe that its adherence to the Constitution's two-thirds majority provision defeats the Constitution's public education funding requirements. We conclude that an irreconcilable conflict exists with respect to the relevant constitutional provisions. Because the Governor has seen fit to petition this court in mandamus, and because evidently further legislative discussions are futile, it becomes the responsibility of this court to order the Legislature to fund public education and to balance the budget. It is a waste of public resources to simply tell the Legislature to forge on and deliberate and negotiate further, since that body has failed to perform its constitutionally required function. As a result, this court is faced with the onerous task of weighing the various constitutional provisions and, in effect, prioritizing them.

The two-thirds majority requirement is a procedural requirement. It is a process requirement by which legislative action is accomplished and decisions that weigh the public interests are accounted for. In the area of taxation this means that the Legislature must agree by a two-thirds majority as to which mechanisms will be employed to generate revenue. Without a two-thirds majority, revenue measures may not be enacted. This general constitutional provision does not purport to say what the substance of the revenue measures ought

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492-95 (2002), *cert. denied,* --- U.S. ----, 123 S.Ct. 2097, 155 L.Ed.2d 1066 (2003).

to be, only that whatever they be, they are acceptable to two-thirds of the elected members of each house of the Legislature.

In contrast, the Constitution requires specifically, as a matter of substantive constitutional law, that public education be funded. The framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access. If the procedural two-thirds revenue vote requirement in effect denies the public its expectation of access to public education, then the two-thirds requirement must yield to the specific substantive educational right.

The Legislature must resume its work of funding education and selecting appropriate methods of revenue generation to balance the state's budget. Therefore, we grant the petition as to the Legislature of the State of Nevada and direct this court's clerk to issue a writ of mandamus directing the Legislature to proceed expeditiously with the 20th Special Session under simple majority rule. The relief prayed for in the petition as to the Lieutenant Governor and the individual legislators and in the counter-petition is denied.

/s Agosti, C.J.

We concur:

/s Shearing, J.

/s Rose, J.

/s Leavitt, J.

/s Becker, J.

/s Gibbons, J.

MAUPIN, J., dissenting in part and concurring in part:

The Governor's petition seeks our intervention to judicially pronounce that the Legislature has violated Articles 9 and 11 of the State Constitution by its failure to fund the education budget and balance the budget over the next two fiscal years. He also seeks an order requiring legislative compliance with these constitutional provisions, via passage of taxing measures to defray the state's estimated expenses for the biennium beginning July 1, 2003, within a time certain. I would decline the Governor's invitation to intervene in the legislative budgetary process--a process that represents the discretionary authority of a co-equal branch of the state government--*at this time.* In this, I would note that none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today. I also note that the legislative response to the petition acknowledges the Legislature's constitutional obligations concerning the budget.

The Governor filed this writ petition because the Legislature failed to approve a balanced budget before the start of the new fiscal year. I acknowledge, with the majority, the following undisputed features of this controversy. First, that the Governor is responsible for seeing that this state's laws are faithfully executed[1] and for proposing a state budget and submitting it to the Legislature.[2] Second, that our Constitution requires the Legislature to approve a balanced budget. Third, that it also compels the Legislature to support and maintain the public school system.[3] Fourth, that the Legislature must appropriate the money needed for all state gov-

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[1] Nev. Const. art. 5, § 7.

[2] *Id.* art. 4, § 2(3).

[3] Nev. Const. art. 11, § 6 provides that "[i]n addition to other means provided for the support and maintenance of [the state] university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund."

ernment expenditures and must provide for an annual tax to defray the state's estimated expenses for the two fiscal years following its regular biennial session.[4] Fifth, that the state's current fiscal year commenced July 1, 2003,[5] and that the State Treasurer may not release general funds from the state treasury without specific legislative appropriation.[6] All of this notwithstanding, now that the Governor has called the Legislature into special session to resolve the budget impasse over the Distributive School Account (DSA), the Legislature is under no express constitutional duty to pass its appropriations and tax bills by the beginning of the fiscal year.[7] Indeed, in the last ten years, the Legislature has worked beyond the fiscal year's beginning three times. That the Legislature has had more than enough time to comply with the funding mandates is constitutionally beside the point. Because the first quarterly distribution of funds to the various county school districts for this fiscal year will not occur until August 1, 2003,[8] there is still a short window within which the Legislature can itself insure compliance with the constitutional mandate for public school funding. Accordingly, I would defer the relief afforded by today's majority until it becomes evident that the constitutional mandate to fund edu-

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[4] Nev. Const. art. 9, § 2(1) provides that "[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year."

[5] Nev. Const. art. 9, § 1.

[6] *Id.* art. 4, § 19.

[7] Article 4, Section 2(2) of the State Constitution limits regular legislative sessions to 120 days and renders void legislative action taken at any other time except where, as here, the Governor has convened a special legislative session.

[8] NRS 387.124(1) requires the state superintendent of public instruction to apportion the state DSA in the state general fund among the several county school districts on a quarterly basis, starting on or before August 1, November 1, February 1, and May 1 of each year. The DSA must be funded for the current biennium for this to occur.

cation will not be satisfied in time for compliance with the statutory requirements for distribution of state funds to local school districts.

Remedies sought by the Governor

Simply stated, the Governor seeks a judicial declaration that the Legislature has violated the Constitution and an order that the Legislature comply with it. This, in my view, will not provide a solution, other than to chastise the Legislature for its inability to deal with the voting impasse in which it is now embroiled. The Legislature concedes its constitutional obligation to fund public education. Why the relief actually sought in the petition will not effect a concrete solution is explained immediately below.[9]

As a threshold matter, the separation of powers doctrine stands as an impediment to our immediate involvement. Subject only to the reservation of the legislative power to the people in Article 19, our Constitution bestows all legislative authority upon the Legislature.[10] It seems well settled that "a court will not issue the writ of mandamus to compel a state legislature or an officer of such legislature to exercise their legislative functions or to perform duties involving the exercise of discretion."[11] This rule is expressed in the Nevada

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[9] *See Campaign for Fiscal Equity, Inc. v. State of New York*, ---N.Y.2d ---, --- N.Y.S.2d ----, --- N.E.2d ----, 2003 WL 21468502, at *---- (N.Y. June 26, 2003) (noting that simple direction of education authorities to follow the New York State Constitution is problematic in terms of effecting compliance and in terms of providing adequate judicial redress for a constitutionally infirm education funding system).

[10] Nev. Const. art. 4, § 1; *see generally* Nev. Const. art. 19.

[11] R.T.K., Annotation, *Mandamus to Members or Officer of Legislature*, 136 A.L.R. 677, 677 (1942); *e.g., Wells v. Purcell*, 267 Ark. 456, 592 S.W.2d 100 (1979) (holding that a writ of mandamus could not be issued to compel legislative officers to adjourn or attempt to adjourn the legislature, or to obtain an adjournment from the governor); *Limits v. President of the Senate*, 414 Mass. 31, 604 N.E.2d 1307 (1992) (denying mandamus relief to compel the state legislature's action on a proposed constitu-

Constitution:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.[12]

Certainly, the specifics of creating a budget fall within the discretion of the Legislature.

We are asked in the Governor's petition, at least implicitly, to intervene in the current legislative controversy to force individual members of the Legislature to vote (exercise their discretion) in a certain way. Because the people of this state elected the individual members of the Legislature and their primacy to vote as they so choose, we cannot grant this relief. The pre- eminent right of individual lawmakers is to vote their consciences on individual measures. Their individual votes do not violate the Constitution, their votes as a body *may* do so.

For similar reasons, we either cannot or should not, as suggested by some of the legislators, order the Governor to amend the parameters of the special session to open previously closed budget accounts. First, this form of relief would only make a balanced budget *possible;* second, such relief would impinge upon the prerogatives of the executive branch to define the scope of special sessions.[13] This is underscored by the fact that a balanced budget is possible now; it is just

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tional amendment); *State ex rel. Daschbach v. Meyers,* 38 Wash.2d 330, 229 P.2d 506 (1951) (declining to issue a writ of mandamus compelling legislature to affix on a bill a different date of passage).

[12] Nev. Const. art. 3, § 1(1).

[13] *See State v. Dickerson,* 33 Nev. 540, 562, 113 P. 105, 111 (1910).

improbable under the current parameters of the special session. Thus, in my view, we cannot constitutionally order any member of the Legislature to vote in a certain way and we cannot order the Governor to open budgets to create a mere possibility that the Legislature can arrive at a balanced budget.[14] As of now, neither the Governor nor any individual legislator has violated the Constitution.[15] This having been said, compliance with the constitutional mandate to appropriate state education funding must occur in sufficient time to allow the quarterly distribution to county school districts on or before August 1, 2003, per NRS 387.124(1).

Remedy afforded by the court

Given our intervention, the petition necessarily seeks our resolution of separate mandatory provisions in the Nevada Constitution that *may* remain in conflict in the current application. Section 6 of Article 11 mandates legislative funding for Nevada schools, the budget for which may be set by a simple majority of each house of the Legislature. Section 2(1) of Article 9 requires that additional taxes be created whenever projections indicate state revenue will be insufficient to defray estimated expenses of the state. And Section 18(2) of Article 4 requires that any increase in taxes must be approved by two-thirds of the members of each legislative body. Thus, while the state's education budget may be set by simple majorities of each legislative house, any new taxes to fund the budget may only be accomplished via supermajority. These provisions are not inherently in conflict; they only conflict in the event education funding is prevented by an inability to balance the budget with sufficient funding mecha-

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[14] *Id.*

[15] I recognize the Majority's concern that failure to provide immediate appropriations to fund the DSA will impede county school district planning and the hiring of personnel. While this is very important, it does not, in my view, require resolution of the constitutional impasse by immediate intervention by this court.

nisms. That is the current state of affairs, as described by the majority.

I would now turn to address the following observations submitted by the Legislature in its response to the Governor's petition:

> With respect to the allegation that the Legislature has not balanced the state budget for the next two fiscal years, and not done so in a timely manner, that allegation is simply erroneous....
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> ....
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> ... [T]he Legislature has worked diligently to fulfill its constitutional duties and continues to engage in such work, and ... complete its duties as soon as possible.
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> ....
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> ... The Answering Respondents [the Legislature] agree that the Legislature has a mandatory duty to provide money for education and to ensure adequate revenue to pay state expenses.

The Legislature goes on in its papers filed in this case to request our forbearance to allow it to acquit its admitted constitutional responsibility to fund a state education budget. I can only observe that this Legislature has completed the mandatory 120-day session, has been convened twice in special session and has failed to fund the DSA and balance the budget. It has had plenty of time to fulfill its constitutional obligations. I would give the Legislature more time; but the exigencies of the current situation require some dispatch.

Absent the immediate relief now being afforded, the Governor, of course, would have been free to amend the scope of the special session to facilitate a resolution. Also, individual legislators could, upon further deliberation, have relented to help comply with the supermajority requirements. And, as stated, there was still a window of opportunity for

the two branches of government to resolve the impasse without our assistance. In the absence of an education budget crafted and funded in time to effect statutory distribution of funds to the county school districts, we could appropriately declare the impasse at an end because time then would truly be of the essence.[16] Accordingly, I would give the Legislature until July 28, 2003, to resolve the impasse[17] before intervening and considering the relief afforded today, along with other possibilities.[18]

I take this opportunity to comment upon the dynamic that brings us to this point in our state's history. For years, a philosophical debate over provision of state services has been developing and is highlighted by the unparalleled population growth here in Nevada and economic conditions governed by external forces, including those attendant to the attacks of September 11, 2001. This debate is the signal feature of the 2003 legislative sessions. The primary concerns of both sets of antagonists involve the quality of state services, the extent to which state services need to be expanded and/or improved, including education services for our children, and unwise or wasteful use of state resources; resources that are paid for by the citizens of this state. This debate has been conducted in a true democratic spirit and both sides have admirably stated their cases. In my view, taking judicial notice of the public debate, considerable waste has been re-

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[16] *See supra* note 8.

[17] *Id.*

[18] Again, we are powerless to order co-equal branches of government to exercise individual acts of constitutional discretion. Our authority depends upon whether extraordinary relief is warranted and in exercising our authority to grant relief, we would be restricted to an interpretation of the Constitution, utilizing recognized tenets of statutory construction. *See Nevada Mining Ass'n v. Erdoes,* 117 Nev. 531, 538, 26 P.3d 753, 757 (2001) (when construing constitutional provisions, the Nevada Supreme Court uses the same rules of construction that are used to interpret statutes).

vealed, services can be improved, and many in our state government have been working to improve the situation. Nevertheless, it is not evident that the totality of fiscal problems facing Nevada will be solved in the near term. What is evident is that our schools must, as matter of constitutional law, be funded on or before August 1, 2003.

s/ Maupin, J.

Appendix B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

Honorable Kenny GUINN,
Governor of the State of Nevada,

Petitioner,

vs.

The LEGISLATURE OF the STATE OF NEVADA; Honorable Lorraine T. Hunt, President of the Senate; Honorable Richard D. Perkins, Speaker of the Assembly; Mark E. Amodei, Senator; Terry Care, Senator; Maggie Carlton, Senator; Barbara Cegavske, Senator; Bob Coffin, Senator; Warren B. Hardy, Senator; Bernice Mathews, Senator; Mike McGinness, Senator; Joseph M. Neal, Jr., Senator; Dennis Nolan, Senator; Ann O'Connell, Senator; William J. Raggio, Senator; Raymond D. Rawson, Senator; Dean A. Rhoads, Senator; Michael Schneider, Senator; Raymond C. Shaffer, Senator; Sandra Tiffany, Senator; Dina Titus, Senator; Randolph Townsend, Senator; Maurice Washington, Senator; Valerie Wiener, Senator; Bernie Anderson, Assemblyman; Walter Andonov, Assemblyman; Sharron E. Angle, Assemblywoman; Morse Arberry, Jr., Assemblyman; Kelvin D. Atkinson, Assemblyman; Bob Beers, Assemblyman; David Brown, Assemblyman; Barbara E. Buckley, Assemblywoman; John C. Carpenter, Assemblyman; Vonne S. Chowning, Assemblywoman; Chad Christensen, Assemblyman; Jerry D. Claborn, Assemblyman; Tom Collins, Assemblyman; Marcus Conklin, Assemblyman; Jason Geddes, Assemblyman; Dawn Gibbons, Assemblywoman; Chris Giunchigliani, Assemblywoman; Pete Goicoechea, Assemblyman; David Goldwater, Assemblyman; Tom Grady, Assemblyman; Josh Griffin, Assemblyman; Don Gustavson, As-

semblyman; Joe Hardy, Assemblyman; Lynn C. Hettrick, Assemblyman; William C. Horne, Assemblyman; Ron Knecht, Assemblyman; Ellen M. Koivisto, Assemblywoman; Sheila Leslie, Assemblywoman; R. Garn Mabey, Jr., Assemblyman; Mark A. Manendo, Assemblyman; John A. Marvel, Assemblyman; Kathy McClain, Assemblywoman; Bob McCleary, Assemblyman; Harry Mortenson, Assemblyman; John Oceguera, Assemblyman; Genie Ohrenschall, Assemblywoman; David R. Parks, Assemblyman; Peggy Pierce, Assemblywoman; Rod Sherer, Assemblyman; Valerie Weber, Assemblywoman; and Wendell P. Williams, Assemblyman,

Respondents.

Lynn Hettrick; Garn Mabey; Bob Beers; Valerie Weber; Chad Christensen; Walter Andonov; David Brown; Sharron Angle; Don Gustavson; John Marvel; John Carpenter; Pete Goicoechea; Rod Sherer; Tom Grady; Ron Knecht; Barbara Cegavske; Mike McGinness; Ann O'Connell; Sandra Tiffany, and Maurice Washington, Members of the Legislature of Nevada,

Counter-Petitioners,

vs.

Honorable Kenny Guinn, Governor of the State of Nevada, and the Legislature of the State of Nevada,

Counter-Respondents.

No. 41679.

Sept. 17, 2003

Petition for rehearing of *Governor v. Nevada State Legislature*, 119 Nev. ___, 71 P.3d 1269 (2003).

Petition dismissed; opinion clarified.

Brian Sandoval, Attorney General, and Jeff E. Parker, Solicitor General, Carson City, for Petitioner and Counter-Respondent.

Brenda J. Erdoes, Legislative Counsel, Carson City; Hale Lane Peek Dennison & Howard and N. Patrick Flanagan III, Reno, for Respondent Nevada State Legislature.

Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd., and Mark E. Amodei, Carson City, for Respondents Terry Care and Mark E. Amodei.

Kathleen J. England, Las Vegas, for Respondent Morse Arberry, Jr.

Barbara E. Buckley, Carson City, in Proper Person.

Beckley Singleton, Chtd., and Daniel F. Polsenberg and Beau Sterling, Las Vegas, for Counter-Petitioners.

Jeffrey S. Blanck, General Counsel, Washoe County School District, Reno; Walther Key Maupin Oats Cox & LeGoy and Michael E. Malloy, Reno, for Amicus Curiae Washoe County School District.

Dyer, Lawrence, Penrose, Flaherty & Donaldson and Michael W. Dyer, Carson City, for Amici Curiae Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County, and Washoe Education Association.

Ellsworth Moody & Bennion, Chtd., and Keen L. Ellsworth, Las Vegas, for Amicus Curiae Nevada Congress of Parents and Teachers Association.

C.W. Hoffman Jr., General Counsel, Las Vegas, for Amicus Curiae Clark County School District.

Law Offices of Thomas D. Beatty and Thomas D. Beatty, Las Vegas, for Amici Curiae Clark County Association of School Administrators, Washoe County Education Administrators, and Nevada Association of School Administrators.

McCracken Stemerman Bowen & Holsberry and Richard G. McCracken, Las Vegas, for Amici Curiae Nevada State AFL-CIO and Nevada State Employees Association, AFSCME, Local 4041.

McDonald Carano Wilson LLP and John J. Laxague, Michael A.T. Pagni, Jeffrey A. Silvestri and Thomas R.C. Wilson II, Reno, for Amici Curiae Nevada Taxpayers Association, Associated Builders and Contractors-Sierra Nevada Chapter, AGC Nevada, Nevada Association of Mechanical Contractors, Sierra Chemical Company, Polymer Plastics Corporation, Barth Electronics, EDAWN/ Western Nevada Development Authority, Nevada Consumer Finance Corporation, Nevada Petroleum Marketers and Convenience Store Association, Cal-Neva Franchise Owners Association, 7-Eleven Franchise Owners Association of Southern Nevada, Nevada Resident Agents Association, Monte L. Miller and Joshua C. Miller, Nevada Bankers Association, Nevada Manufacturers Association, Nevada Motor Transport Association, Retail Association of Nevada, Tiberti Fence Company, Carson City Chamber of Commerce, Las Vegas Chamber of Commerce, Nevada Franchised Auto Dealers Association, Nevadans for Real Tax Fairness, Household International, Nevada Corporate Headquarters--Cort Christie, Robert List, Henderson Chamber of Commerce, Thomas Powell, Pic-Mount Imaging, Corp., Phoenix Holdings of Nevada, Inc., Nevada Association of Independent Businesses, Chain Drug Council of Nevada, and Grocery Industry Council of Nevada.

Thomas J. Ray, General Counsel, Las Vegas, for Amicus Curiae University and Community College System of Nevada.

James T. Richardson, Reno, for Amicus Curiae Nevada Faculty Alliance.

Layne T. Rushforth, Las Vegas, for Amicus Curiae Nevada Concerned Citizens.

Wilson & Barrows and Stewart R. Wilson, Elko; Gregory T. Broderick, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

On July 10, 2003, we entered an opinion in this matter partially granting the Governor's petition for a writ of mandamus and denying the counter-petition filed by twenty Legislators. Our opinion directed this court's clerk to issue a writ directing the Legislature "to proceed expeditiously with the 20th Special Session under simple majority rule." The impetus for the writ petition, and our opinion, was the Nevada Legislature's continued failure to appropriate funds for the K-12 school system and to balance the state's budget by providing an adequate revenue plan to defray the state's estimated expenses for the biennium beginning July 1, 2003.

On July 21, 2003, the counter-petitioners filed a rehearing petition, asking us to recall our writ of mandamus, reconsider our opinion, and grant one of the remedies suggested in the counter-petition. Later that same day, the Legislature fulfilled its constitutional duties to fund the public school system and balance the budget, and it adopted the revenue-raising legislation required to balance the budget by a two-thirds supermajority. According to the Legislature,

> the Court's ruling in this case facilitated a shift from the tension that was caused by an externally-imposed

> requirement to achieve a 2/3 consensus, to a situation where the legislators were internally motivated to achieve a 2/3 consensus voluntarily. This shift in perception allowed reevaluation of fixed positions which led expeditiously to the passage of Senate Bill No. 8 ....

The counter-petitioners then supplemented their rehearing petition and moved this court to withdraw its opinion. At our direction, the Governor and Legislature responded to the rehearing petition. Assemblyman Arberry filed a supplemental response. Amici Curiae Education Associations[1] and the Pacific Legal Foundation also filed responses. Counter-petitioners filed a reply.

The Legislative stalemate that was thrust upon us was the result of a recent Nevada constitutional amendment requiring a two-thirds majority to pass legislation that creates, generates or increases any public revenue, including taxes. The Senate had passed legislation that would have completed the budget process, but the Assembly had deadlocked and could not garner the necessary two-thirds vote because of a difference of opinion among Assembly members over the role the two-thirds provision played in the budget process. The deadlock prevented the Assembly from funding the K-12 appropriations bill and balancing the budget.

We concluded, based on the calamitous circumstances facing our state, that the Legislature could proceed with the 20th Special Session under a simple majority requirement, given that the dispute over the two-thirds majority requirement's applicability to the budget process had prevented the Legislature during one regular and two special sessions from fulfilling its constitutional duties to appropriate funds and to

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[1] Nevada State Education Association, Clark County Education Association, Education Support Employees Association of Clark County and Washoe Education Association.

maintain the public school system while balancing the budget. Accordingly, we granted the petition as to the Legislature as a body, but denied the petition as to the individual legislators and the Lieutenant Governor. We also denied the counter-petition, which requested us to determine that the two-thirds supermajority provision applied not only to increases in revenue, but to the budget itself.

BACKGROUND

The Nevada Constitution has, since it was enacted, required that bills and joint resolutions be passed by a simple majority of each house. Article 4, Section 18(1) originally provided that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution."[2] In 1993, a member of the Legislature sponsored a resolution that proposed amending the Constitution to require a two-thirds majority of each house to increase certain existing taxes or impose new taxes.

At a hearing on the proposed resolution, legislators asked one of the main proponents if the other states with similar provisions required a supermajority to approve the state budget as well as new taxes, or if these states retained a simple majority for budget approval and a supermajority for funding.[3] Legislative members pointed out to the proponent that the proposed amendment did not address the budget, only changes in revenue. Thus the Constitution, if amended, would require a two-thirds majority to change the existing revenue structure, but only a simple majority to approve the

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[2] Debates & Proceedings of the Nevada State Constitutional Convention of 1864, at 837 (Andrew J. Marsh off. rep., 1866) [hereinafter Debates & Proceedings].

[3] Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation, 67th Leg. (Nev., May 4, 1993) (discussions involving Assembly members James A. Gibbons, Larry L. Spitler and Myrna T. Williams).

budget.[4]

The members noted that once the budget is approved, the Nevada Constitution requires that revenue be increased to balance the budget where the cost of services exceeds projected revenue.[5] Finally, the legislators expressed their concerns that the proposed language would create the potential for a constitutional crisis because a minority of legislators might disagree with the majority's lawfully approved budget and therefore refuse to consider any revenue increases until their budgetary concerns were met, thus creating a deadlock. The amendment, according to one legislator, "was actually empowering a smaller group of people not to fund the budget."[6] The legislators were concerned that the process would allow a minority of the Legislature, representing a minority of this State's citizens, to control public services, contrary to the wishes of a majority of the Legislature, representing a majority of the citizens.[7]

The proponent did not answer the questions posed by other legislators, but indicated that the issues would be researched and additional information would be provided to committee members.[8] The record does not reflect whether additional information was provided, and the Legislature declined to approve the proposal.[9] The proponents then took

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] In answer to the question concerning minority control, at least one state, Florida, has adopted some flexibility in its supermajority tax provision. Florida does not include money necessary to support state bonds in the supermajority requirement and permits increases when necessary to offset changes in federal laws, such as Medicare, that impact the state. Fla. Const. art. VII, § 1(e). Oregon, with a legislature that also meets biennially, allows its equivalent of Nevada's Interim Finance Committee to ap-

the proposal directly to Nevada's voters through the initiative process.

Unfortunately, the initiative petition and proposed amendment did not resolve the conflict discussed in the legislative hearings. Although the initiative's proponents were aware of the potential conflict that could result from requiring a simple majority for appropriations and a supermajority for new or increased public revenue, they did not specifically address this problem in the initiative's language. Nor did the arguments for and against passage, presented in the voter information and sample ballot pamphlet, discuss the issue or the effect the proposal could have on other constitutional rights or the state's overall fiscal integrity.[10] Nevada's voters passed the constitutional amendment in the 1994 and 1996 general elections.[11] Consequently, Nevada's Constitution, in Article 4, Section 18(2), now requires a two-thirds vote of each house "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." But the initiative did nothing to the constitutional mechanism for passing the underlying appropria-

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prove new programs and revenue to support those programs when the legislature is not in session, subject to retroactive approval at the next session. Or. Const. art. III, § 3.

[10] *Compare* Compilation of Ballot Questions 1996, Question No. 11, Arguments for Passage (stating that "[i]t may be more difficult for special interest groups to get increases they favor," and that it may require state government to prioritize and economize), *with id.* Arguments Against Passage (stating that "Nevada must remain flexible to change the tax base").

[11] *See* Nev. Const. art. 19, § 2(4) (providing that a constitutional amendment requires approval of a majority of the voters at two general elections).

tions bills,[12] which requires only a simple majority vote under Article 4, Section 18(1). Thus, the stage was set for legislative impasse.

As noted in our prior opinion, the Nevada Legislature, which currently meets only every other year for an abbreviated 120-day regular session,[13] adequately functioned within the new constraints in the 1997, 1999 and 2001 sessions. Then, the state had a budget surplus and the budget could be balanced without major tax increases. By 2003, however, the state's economic situation had changed drastically.

The impact of terrorism, economic recession and increases in population caused the Governor to begin the 2003 legislative session with a $980 million request for new revenue to balance his proposed budget for the 2003-2005 biennium. The revenue request was based on the need to recover revenue shortfalls caused by the downward trend in Nevada's economy after the terrorist attacks of September 11, 2001, and increased expenses relating to terrorism, growth and changes mandated by federal laws. Over the four-month regular session, the proposed budget was reduced by approximately $135 million. However, philosophical differences still permeated the final days of the regular legislative session. Consequently, by the June 3 conclusion of the 2003 regular session, the Legislature did not complete its constitutional duty to approve a balanced budget, but it appropriated $3,264,269,361 for various government functions and the

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[12] Nevada's budget is composed of several separate bills: the General Appropriations Act (funds most state government); the Authorized Expenditure Act; the bill appropriating funds to the State Distributive School Account (funding K-12 education); the Class-Size Reduction Act; the Capital Improvement Bill (authorizing construction, maintenance and repair of state buildings); and the Unclassified Pay Bill.

[13] Nev. Const. art. 4, §§ 2(1), 2(2). The 1997 session was not subject to the 120-day limitation, as the limit was not approved by the voters until 1998.

Governor signed these appropriations into law.[14]

The Legislature further failed in its constitutional duty to appropriate funds for Nevada's public school system.[15] This funding dilemma apparently resulted from a confluence of factors, including the abbreviated nature of the regular legislative session; the need to address the comprehensive mandates of the new Federal No Child Left Behind Act;[16] and policy disagreements between the Senate and Assembly in regard to consolidating certain childhood educational programs, implementing class-size reduction programs, earmarking money for textbooks and other instructional materials, and encouraging experienced teachers to work in at-risk schools or schools designated as needing improvement and, of course, the revenue shortfalls.

On June 3, 2003, the Governor convened the 19th Special Session of the Legislature to appropriate funds for public education and to provide a tax plan sufficient to pay for the state's services and balance the final budget.[17] On June 6, 2003, the Senate passed Senate Bill 2 to authorize and appropriate the State Distributive School Account (SDSA) in the general fund for the fiscal years beginning July 1, 2003, and July 1, 2004. But Senate Bill 2 lacked the votes necessary to pass the Assembly, because the passage of the bill, without a revenue plan, would violate the balanced budget provisions of the Constitution. Certain Assembly members insisted that the two-thirds requirement applied to the budget

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[14] All but three sections of this law took effect on July 1, 2003. Two provisions took effect on June 3, 2003, and one other will take effect on July 1, 2004. 2003 Nev. Stat., chs. 327, 328 and 441.

[15] Nev. Const. art. 11, § 6. Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed.

[16] 20 U.S.C. §§ 6301-7014.

[17] Nev. Const. art. 5, § 9; *id.* art. 4, § 2(2).

as well as the tax structure. These individuals argued that the Governor should expand the special session to include all components of the budget and that the budget process be reopened so cuts in services as well as tax increases could be considered in reaching a balanced budget.

Because the majority of the Legislature did not agree with this interpretation and the request to reopen the budget process, no progress on finalizing and balancing the budget was made and public schools remained unfunded. Consequently, on June 12, 2003, the Governor adjourned the 19th Special Session as requested by the Senate Majority Leader and the Speaker of the Assembly.

With no end to the stalemate in sight, the Governor convened the Legislature that same day for a second special session (the 20th Special Session) to begin on June 25, 2003.[18] On the first day of that session, the Senate unanimously passed Senate Bill 5 to authorize and appropriate the SDSA, and transmitted the legislation to the Assembly. In addition, the Senate, by the constitutionally mandated two-thirds majority, passed tax measures that provided a balanced budget for the 2003-2005 biennium, Senate Bills 2 and 6. Once again, Senate Bill 2 was not passed out of the Assembly. Assembly members sought, however, to amend Senate Bill 6 to incorporate the SDSA authorization and appropriations and provide sufficient taxes to balance the budget. But faced with renewed demands that the budget be reopened for cuts in spending, the Assembly twice failed to pass the amended bill by the required two-thirds majority; both votes were 27 to 15, one vote shy of the constitutionally mandated supermajority.

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[18] At this point, the special sessions were reportedly costing the taxpayers $50,000 per day.

The Governor, who is responsible for ensuring that Nevada's laws are faithfully executed[19] and for submitting a proposed state budget to the Legislature,[20] filed a petition for a writ of mandamus at the start of the fiscal year, July 1, 2003, seeking to compel the Legislature to fulfill its constitutional duties by funding K-12 public education and passing a balanced budget. The Legislature, in its official response to the petition, asserted that a writ should not issue because no dispute existed over the interpretation of the Constitution and the Legislature simply needed more time to come to a consensus. The Legislature indicated, through counsel, that the plain language of the Constitution required a simple majority to pass the budget, while the supermajority provisions only applied to a specific proposal to increase, change or create taxes, not the total amount of revenue to be generated.

The Legislature reached this conclusion using standard rules of constitutional construction. In its answer, the Legislature indicated that its construction was the only way to harmonize the simple majority provision for the budget with the supermajority provision for taxes and the constitutional requirement that revenues shall be raised to balance a budget. According to the Legislature, when a legislative majority approves a budget, it does so with full knowledge of the revenue projections and the Constitution's mandatory balanced budget provisions. As the Legislature noted, when an approved budget exceeds the projected revenues, the Constitution requires that revenues be raised to balance the budget. By approving the budget, the majority has already decided that the expenditures for services embodied in the budget are necessary and that revenue must be increased to provide for them. Thus, the majority decides whether additional revenue is necessary and the total amount of revenue that needs to be raised to balance the budget. The manner in

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[19] Nev. Const. art. 5, § 7.

[20] *Id.* art. 4, § 2(3).

which revenues will be raised, that is, the specific changes in the tax structure, then requires supermajority approval.

However, a minority of legislators disagreed with the official response. They filed a separate answer and counter-petition. The counter- petition sought to compel the Governor to call a special session to consider and make cuts to the entire state budget and requested this court to hold the supermajority provision applies to the budget process whenever a budget requires revenue increases. The counter-petitioners acknowledged that a substantial tax increase was necessary; however, they disagreed on the gross amount of the increase. The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase. The impasse continued even though the writ petition was pending. The Legislature recessed at the call of the majority leaders of both houses. With the beginning of the new fiscal year came an imminent and grave crisis, caused by the Legislature's failure to complete its constitutional duties. Particularly at risk was Nevada's K-12 public education system. The school districts' window for recruiting high quality teachers to comply with the No Child Left Behind Act was closing. Anticipating vacant teaching positions, school districts were eliminating special education programs. Both prospective and current teachers began to question their employment in Nevada. The lack of a balanced budget was also not without serious consequences, as it threatened Nevada's bond rating.

This unprecedented crisis arose because of the two antagonistic constitutional provisions with which the Legislature is saddled. Article 4, Section 18(1) requires only a simple majority to enact appropriations bills, but Article 4, Section 18(2) requires a supermajority to generate or increase public revenue to fund those appropriations. That these provisions occupy antagonistic positions was apparent from the

various respondents' conflicting interpretations. The counter-petitioners argued that the supermajority provision for generating public revenue trumps Section 18(1)'s requirement that all other bills, including appropriations, be passed by a simple majority whenever the appropriations call for a tax increase. According to these legislators, the general appropriations bill, passed by a majority of the Legislature, was void because it was not passed by a two-thirds supermajority. The respondent Legislature, on the other hand, asserted that the minority legislators' interpretation frustrates the plain language of Section 18(1). According to the Legislature, "it is evident that [the supermajority] provision does not require a two-thirds vote in regard to a legislative measure which appropriates money, but which does not actually create, generate, or increase public revenue." Faced with these differing views on the supermajority requirement's application, it became our task, as the ultimate custodians of constitutional meaning, to balance Sections 18(1) and 18(2) so as to preserve and credit both clauses to the maximum extent possible.[21]

In construing the Constitution, our primary objective is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective.[22] However, when the enactors' intent cannot be determined, rules of constitutional construction require us to attempt to harmonize differing provisions so as to give as much effect as possible to each provision.[23] We look beyond

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[21] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803); *State v. Rosenthal*, 93 Nev. 36, 41, 559 P.2d 830, 834 (1977); *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo.1996); *Denish v. Johnson*, 121 N.M. 280, 910 P.2d 914, 922 (1996).

[22] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001); *accord In re Anthony R.*, 154 Cal.App.3d 772, 201 Cal.Rptr. 299, 302 (1984).

[23] *Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *Ex parte Shelor*, 33 Nev. 361, 375, 111 P. 291, 293 (1910).

the plain language of constitutional provisions to ascertain intent "when a construction is urged which would result in an absurd situation"[24] or when provisions are subject to conflicting interpretations.[25]

The language of Article 4, Section 18(1) and Article 4, Section 18(2) is clear on its face. But in operation, the two provisions resulted in legislative paralysis in one general and two special sessions. The parties advanced conflicting interpretations of the provisions' requirements. We thus looked to extrinsic evidence surrounding the supermajority provision's enactment to determine its intended effect.

As mentioned earlier, Article 4, Section 18(2) originated as Ballot Question 11 during the 1994 and 1996 general elections. The supermajority requirement was intended to make it more difficult for the Legislature to pass new taxes, hopefully encouraging efficiency and effectiveness in government. Its proponents argued that the tax restriction might also encourage state government to prioritize its spending and economize rather than explore new sources of revenue. But neither the ballot question nor its explanation in the voter pamphlet informed voters of the likelihood of legislative paralysis and its effect on the state's fiscal and educational integrity. Indeed, even the initiative's prime sponsor was unsure of the consequences of reposing within a small group of legislators the power to block majority-approved appropriations. And, in 1993, he represented to the Assembly that the supermajority requirement "would not hamstring

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[24] *Bussanich v. Douglas*, 152 Ariz. 447, 733 P.2d 644, 647 (Ariz.Ct.App. 1986).

[25] *See Soto v. Superior Court*, 190 Ariz. 450, 949 P.2d 539, 544 (Ariz. Ct. App. 1997); *Utah School Boards v. State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001); *cf. Cook v. Maher*, 108 Nev. 1024, 842 P.2d 729 (1992) (resolving conflicting constitutional interpretations).

state government or prevent state government from responding to legitimate fiscal emergencies."[26]

The voters were not privy to the Assembly's concerns that culminated in the requirement's legislative rejection, and the requirement's proponents failed to address those concerns when presenting the initiative. Because the voters were not informed of the problems the amendment would cause if a minority of legislators disagreed with the majority over the level of services to be provided to Nevada citizens, we could not determine how the voters intended to resolve such a conflict.[27]

We were persuaded that the Legislature's view of the Constitution's plain language was correct. A simple majority is necessary to approve the budget and determine the need for raising revenue. A two-thirds supermajority is needed to determine what specific changes would be made to the existing tax structure to increase revenue. Consequently we rejected the counter-petitioners' interpretation and dismissed the counter-petition.

However, our dismissal of the counter-petition could not, standing alone, resolve the impasse. While we could direct the legislators to proceed with their constitutional duties to pass a balanced budget and fund education, we had no ability

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[26] Hearing on A.J.R. 21 Before the Assembly Comm. on Taxation, 67th Leg. (Nev., May 4, 1993).

[27] As we noted in our prior opinion, the initiative measure included a provision that permits a majority of the Legislature to refer any proposed new or increased taxes for a vote at the next general election. The voter information, however, did not indicate that this language was included to resolve a budget impasse. Nor could this provision, Article 4, Section 18(3), realistically resolve a budget impasse. As the Legislature meets every other year in odd-numbered years for only 120 days, and general elections are held only every other year in even-numbered years, the voters could not intervene for sixteen months. *See* Nev. Const. art. 4, §§ 2(1), 2(2); NRS 293.12755.

to enforce the order. Under the separation of powers doctrine, individual legislators cannot, nor should they, be subject to fines or other penalties for voting in a particular way.[28] Additionally, we could not, nor did we, direct the Legislature to approve any particular funding amount or tax structure.[29] This does not mean, however, that no other remedy exists to resolve a constitutional crisis created by the Legislature's inability, as a whole, to fulfill its constitutional obligations. In this instance, the minority's refusal to accept the majority's duly passed budget decisions meant that the constitutional requirements to fund public education and balance the budget remained unfulfilled.

In his initial pleadings, the Governor cited to law in other jurisdictions with similar educational constitutional provisions. Courts of those states had assigned high priority to these provisions when their legislatures failed to fulfill their constitutional duties to fund public education. Some amicus briefs urged us to declare the two-thirds majority requirement unconstitutional, as it interfered with the Legislature's ability to fulfill its duty to fund education and balance the budget. At the very least, those amici urged the court to suspend operation of the two-thirds requirement in this session. Other amicus briefs argued against this proposition. Because the impasse was substantial, impairing educational functions, and because we discerned that the supermajority requirement was not created to avoid the Legislature's constitutional duties to fund public education and balance the budget, we considered these arguments.

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[28] *See Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Gravel v. United States*, 408 U.S. 606, 616-18, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir.1992).

[29] Annotation, Mandamus to Members or Officer of Legislature, 136 A.L.R. 677 (1942).

When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must, if it can, strike a balance between the provisions. Conflict avoidance and resolution measures employed in First and Sixth Amendment jurisprudence demonstrate this fact. For instance, tension is continually present between the Establishment Clause and the Free Exercise Clause of the First Amendment.[30] One clause prohibits actions that might constitute the establishment of religion, while the other clause guarantees the right of all to be free to follow their religious preferences. Rather than rigidly enforce either provision, the United States Supreme Court has found in the constitutional machinery "play in the joints" in an effort to strike a balance between them.[31] This rejection of rigid constitutional doctrine is necessary to honor the "transcendent value of free religious exercise in our constitutional scheme," and extends, for example, "to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors."[32]

Similarly, where freedom of the press[33] may jeopardize a criminal defendant's right to a fair trial,[34] the High Court

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[30] *See Tilton v. Richardson*, 403 U.S. 672, 677, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality opinion). A tension exists because, as Justice Brennan once noted, "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the [Free Exercise Clause]." *Abington School Dist. v. Schempp*, 374 U.S. 203, 296, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring).

[31] *Norwood v. Harrison*, 413 U.S. 455, 469, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

[32] *Norwood*, 413 U.S. at 469, 93 S.Ct. 2804.

[33] U.S. Const. amend. I.

permits restrictions on trial publicity.[35] The Supreme Court has stated that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."[36]

In reconciling the competing provisions of Nevada's constitutional requirements to fund education and balance the budget with the supermajority requirements for changing the tax structure, we believed that the appropriate analysis required weighing the interests protected by each provision, under the specific facts of this case, to determine whether the net benefit that accrued to one of those interests exceeded the net harm done to the other.[37] The essential issue was whether the supermajority requirement could be improperly used by a few to challenge the majority's budget decisions, thereby preventing the Legislature from performing its other constitutional duties.

The primary interest supported by permitting the Legislature to suspend the supermajority requirement in this case was nothing less than the constitutional mandate to fund public education. The United States Supreme Court fifty years ago stated:

> [E]ducation is perhaps the most important function of state and local governments.... [Education] is the very foundation of good citizenship. Today it is a principal

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[34] Id. amend. VI.

[35] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir.1950) (internal quotation marks omitted)).

[36] *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

[37] *See Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 559 (3d Cir.1984), *vacated on other grounds*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

> instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[38]

This statement is equally pertinent today. "No other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State."[39] Our State Constitution's framers explicitly and extensively addressed education,[40] believing strongly that each child should have the opportunity to receive a basic education.[41]

In addition, we were necessarily concerned with the interest of preserving the democratic process. A majority of legislators, representing a majority of the citizens of this state, make decisions on the services to be provided and the

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[38] *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[39] *Claremont School Dist. v. Governor,* 142 N.H. 462, 703 A.2d 1353, 1356 (1997).

[40] *See* Nev. Const. art. 11, § 1 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof."); *id.* art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year ... and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools."); *id.* art. 11, § 6 ("In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund ....").

[41] *See Debates & Proceedings, supra* note 2, at 567-72.

future of the state. These include what programs to provide for children, the disabled and senior citizens; the construction and repair of roads and streets; funding of agencies to protect our citizens from telemarketing schemes or fraudulent transactions; costs associated with law enforcement activities; and staffing and location of state offices to avoid delays or long distance travel to obtain necessary documents such as drivers' licenses, vehicle or corporate registrations. Where these matters have been discussed and duly voted upon, the Constitution requires that the decision of the majority be respected.

Against public education, the democratic process and fiscal interests, we balanced the interests fostered by the supermajority requirement. The two-thirds requirement was intended, according to the information supplied to the voters in the 1994 and 1996 elections, to limit the influence of special interest groups, ensuring that one group would not control changes in the tax structure. The voter pamphlet also indicated that the amendment might promote more efficiency in government. These interests are legitimate and important, but they do not outweigh the need to fund education or abide by the majority rule mandated by Article 4, Section 18(1). To avoid an impasse harmful to public education, we determined that the supermajority provision could not be improperly used to avoid majority rule on budget appropriations. Accordingly, we held that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget.

Resolution of the impasse was entirely in the hands of the Legislature. If the minority abided by the Constitution and recognized that majority rule controlled budget appropriations issues and thus the need to generate an amount of revenue, the impasse would end and the only issue remaining, what changes to make in the revenue structure to

achieve a balanced budget, would proceed by the two-thirds supermajority. This is, in fact, what happened. After our decision, the majority made concessions on the budget. Although some legislators would still have preferred additional cuts, they recognized that the Constitution required them to abide by the majority's decision and move on to determine how to balance the budget. Two-thirds of the members of both houses of the Legislature then approved the tax changes necessary to balance the budget. Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties.

In the petition for rehearing, counter-petitioners take an abrupt about-face on interpreting the Nevada Constitution. For, although they strenuously argued in their counter-petition that the two-thirds supermajority provision necessarily predominated over the simple majority provision governing appropriations, and that the legislative appropriations made during the regular session were therefore void, they now argue, for the first time, that a construction permitting one provision to yield to another necessarily results in vote dilution. Yet counter-petitioners' proffered construction of the Constitution, if followed, would also result in vote dilution, according to counter-petitioners' own reasoning.

We do not reach these issues, however, because we determine that the petition for rehearing became moot when the Legislature passed the revenue-generating bills by the requisite two-thirds vote. We have consistently iterated that our duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare princi-

ples of law which cannot affect the matter in issue before [us]."[42]

In this case, once the Legislature adopted revenue-raising legislation by a two-thirds supermajority in order to fund the public school system and balance the state's budget, the rehearing petition became moot. And, although we recognize an exception to the mootness doctrine for issues capable of repetition yet evading review, the issues raised in the rehearing petition are not subject to this narrow exception.[43] As the United States Supreme Court has noted, to evade review, the challenged action must be too short in its duration to be fully litigated before its cessation or expiration.[44] If the Legislature were to increase or raise taxes in the future under simple majority rule, this court would have ample opportunity to review that action.[45]

The two-thirds supermajority provision, as passed, created the potential for an absolute budgetary stalemate in the Legislature; that potential was realized this year and has done significant damage to public education. A judicial resolution of the constitutional conflict was necessary, so that the Legislature could perform its constitutionally mandated du-

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[42] *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

[43] See, e.g., *Langston v. Nevada*, 110 Nev. 342, 344, 871 P.2d 362, 363 (1994).

[44] *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

[45] We reject counter-petitioners' attempt to avoid the mootness bar under the exception that voluntary cessation of unconstitutional conduct will not prevent review. To the extent that counter-petitioners suggest that the Legislature's passage of revenue-raising legislation constitutes unconstitutional conduct, that suggestion is absurd. And to the extent counter-petitioners assert that the Legislature's voluntarily ceased "unconstitutional conduct" was passing revenue-raising legislation by a simple majority vote, there was no such conduct.

ties. Our prior opinion did just that. We dismiss the rehearing petition.[46]

/s Agosti, C.J.

/s Rose, J. /s Leavitt, J.

/s Becker, J. /s Gibbons, J.

SHEARING, J., concurring:

I would simply deny the petition for rehearing. Rule 40(c) of the Nevada Rules of Appellate Procedure sets forth the standards for the content of a petition for rehearing as follows:

> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
>
> (2) The court may consider rehearings in the following circumstances:
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> > (i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> >
> > (ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

This petition for rehearing is not appropriate under any of these provisions. The petition reargues matter previously considered and presents new matter not previously argued. Petitioners have not demonstrated to the court that the court has overlooked or misapprehended any material fact or material question of law. Neither have the petitioners demon-

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[46] We deny counter-petitioners' motion to vacate as well as their emergency stay motion.

strated that the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in this case. The petitioners are additionally requesting new relief. Since the petition for rehearing does not conform to the appropriate standards, it must be denied.

I do not agree that it is appropriate, in responding to a petition for rehearing, for this court to attempt to answer public criticism of this court's decision or to criticize the constitution or laws of this state. We must accept the duly enacted constitution and laws of this state, whether they are well advised or ill advised; the court's duty is to decide the cases brought before it. Often that duty involves trying to reconcile provisions that, in practical application, produce results that are incompatible with one another. The court has accomplished that reconciliation in this case. That should end the matter.

/s Shearing, J.

MAUPIN, J., dissenting:

The rehearing petition in this matter should be granted, the writ of mandamus dissolved and the prior majority opinion vacated. First the Nevada State Legislature completed its work without resort to the remedy afforded by this court in the writ. It ultimately complied with the Nevada Constitution as written by appropriating funds for the state educational system and creating the new revenue sources to pay for the appropriations by a two-thirds vote. [1] Second, the perceived

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[1] The Nevada State Constitution requires that the State Legislature appropriate sufficient funds to support and maintain the public school system; that it provide for sufficient revenues to balance the state budget; and that any increases in taxes to fund the state budget be approved by a supermajority of both houses of the legislature. *See* Nev. Const. art. 11, § 6; *id.* art. 9, § 2(1); *id.* art. 4, § 18(2). The writ, as noted by the majority on rehearing, allowed the 2003 Legislature, in special session, to create new funding sources by a simple majority rather than a supermajority to

crisis the majority sought to address in the writ was averted by the legislative action just mentioned. Third, the majority now indicates that the original decision had discrete application to the limited circumstances of the 2003 legislative sessions; thus a need for precedent for future sessions does not exist. Accordingly, the entire matter is moot.

I most strongly take issue with the court's comments on rehearing that the supermajority initiative was flawed from its inception and that the Nevada electorate twice approved it without an understanding that a stalemate between appropriations and taxes could eventuate. The initiative was vetted through two elections and we should not from this vantage point presume to say what the voters of this state knew or did not know. In any case, the potential for such a conflict was inherent in the proposal and the people of this state had every right to make it more onerous for the Legislature to create new revenue streams for the operation of government. Nothing in this constitutional construct prevents the Legislature from crafting a balanced budget and, as noted, the Legislature ultimately complied with the supermajority requirement.

We need look no further than the second paragraph of the Declaration of American Independence for sustenance in any judicial analysis of initiative petitions passed by a vote of the people:

> We hold these truths to be self-evident, ... [t]hat ... governments are instituted ..., deriving their just powers from the consent of the governed ....

This court did not invalidate the tax initiative as somehow being unconstitutional. Having thus affirmed its basic validity, we must recognize that such initiatives, however inconvenient to the operatives of government they may be at

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resolve an impasse in arriving at a balanced budget that existed as of July 10, 2003.

times, represent the ultimate form of citizen consent to government. Accordingly, it is not for us, the supreme court of this state, to criticize the wisdom of a valid initiative embraced by an overwhelming majority of Nevadans. I am therefore of the belief that we should, in response to the petition for rehearing, vacate the writ of mandamus and the prior opinion issued in aid of it.

/s Maupin, J.

Appendix C

IN THE SUPREME COURT
OF THE STATE OF NEVADA

THE HONORABLE KENNY C. GUINN,
Governor of the State of Nevada,

Petitioner,

v.

THE LEGISLATURE OF THE
STATE OF NEVADA, *et al.*,

Respondents.

LYNN HETTRICK, *et al.*,
Members of the Legislature of Nevada,

Counter-Petitioners,

v.

THE HONORABLE KENNY C. GUINN,
Governor of the State of Nevada, and the
LEGISLATURE OF THE STATE OF NEVADA,

Counter-Respondents.

PETITION FOR REHEARING

Respondents/counter-petitioners ask this Court to reconsider and clarify its decision in this case.[1] In particular, counter-petitioners request that the Court recall its writ of Mandamus directing the Legislature to proceed with the 20th

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[1] *Guinn v. Legislature of State of Nevada*, 2003 WL 21557517, 119 Nev. Adv. Op. No. 34 (July 10, 2003) [hereinafter Opinion].

Special Session "under simple majority rule." Instead, this Court should grant one of the alternative remedies suggested in the counter-petition, or at least require the Legislature to fund education first, to assure that education is immediately and adequately funded.

I. THE ARTIFICIAL AND AVOIDABLE "CRISIS"

This Court ruled that Article 4, Section 18(2) of the Nevada Constitution does not apply because of a perceived "crisis" regarding education funding. There is no irreconcilable crisis, however, because the current situation has been cynically manufactured by those wanting to force the highest tax increases.

As noted in the counter-petition, the crisis was caused by the Legislature's decision to fund non-educational state funding first, by a simple majority vote and then ending their regular session without providing *any* funding for K-12 education, in violation of the command of Art. 11, Sec. 6 of the Nevada Constitution. The educational crisis would never have existed if the Legislature had funded education first, as such a vote could clearly have achieved a two-thirds supermajority. Even the Governor concedes: "Any 'tension' [between constitutional provisions] has been created, not by the Constitution, but by the Legislature itself in the sequence in which it addressed the budget and revenue plan for the next biennium." (Governor's Supplemental Brief at 10).

The artificial crisis was caused when a majority of the Assembly chose to pass out AB553, the state operation funding bill, on June 2, 2003, before the K-12 school funding bill (Distributive School Account or "DSA"). The Assembly could have funded education first on June 2, 2003, but chose not to do so. That was the first move to put education funding in jeopardy.

Then, some legislators attempted to conjoin the DSA with the Assembly tax bill in the Ways and Means Commit-

tee. The Speaker stated unequivocally why the DSA and the tax bills were conjoined:

> Let me make it very, very perfectly clear why this particular motion is on the table. There is no secret about it. ***We are not going to give anybody an opportunity to vote for education and not the funding.*** That's in a nutshell what is going on here. There are a lot of folks who would take that option if it was given to them and the coward's way out is not going to be accepted. So that's why we are going to put this together; its going to take two-thirds and people are going to stand up and be counted or they are not.

(Ways and Means Committee Meeting, May 28, 2003, 72nd Legislative Session, emphasis added.)

The political nature of the conflict is apparent. Joining the DSA and the tax bill would force members of the Assembly either to vote for the state's largest tax increase or vote against education. This is a cynical manipulation of the legislative process—not any inherent "tension" between constitutional provisions—has put the education rights of Nevada children in jeopardy.

Let's Put Education First

To make matters worse, there is every reason to believe that this Court's opinion will encourage more harmful manipulation of the legislative process in future sessions. One senator has commented to the press, "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA because of this ruling."[2]

Therefore, this Court should rule that any perceived conflict between educational spending and Article 4, Section 18(2)'s two-thirds requirement is resolved by the Legislature passing funding for education before all other spending. The

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[2] As reported in the Las Vegas Sun on July 12, 2003.

solution imposed by this Court, setting aside the constitutional requirement of a two-thirds vote of each legislative house to raise taxes, was unnecessary to address the crisis. Moreover, it caused the Assembly to act in violation of the Nevada Constitution, violating federal constitutional rights to due Process, Equal Protections, and the guarantee of a republican form of government in the process.

II. THE LACK OF DUE PROCESS, THE VIOLATION OF JUDICIAL PROCEDURE AND THE SIMPLE UNFAIRNESS OF THE PROCESS

A. What Due Process Requires

Due process rights are guaranteed under the Fourteenth Amendment to the Unites States Constitutions. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[3]

Correspondingly, it is a violation of due process rights to grant *sua sponte* relief without notice to the parties that such a result might be possible. An example of this principle is seen in Melendez Colon v. Rivera, where a bankruptcy court granted relief from a stay without informing the parties that it was considering the issue, even though the pleadings had framed the issue around asserted stay violations, rather than potential stay relief or modification.[4] Accordingly, the Bankruptcy Appellate Panel found the court's decision to be a

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[3] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)); *see also Golden v. Averill*, 101 P. 1021, 1027 (Nev. 1909) (recognizing that due process "requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights" and that "[a] hearing and an opportunity to be heard is absolutely essential").

[4] *Id.*

clear abuse of discretion.[5]

Cases have repeatedly recognized the need "to know the issues on which decision will turn and to be apprised of the factual material" so that a party may rebut claims against it.[6] Parties must know the claims and be given the opportunity to meet them.[7] While there are no hard, fast rules as to what violates these procedural due process rights, the United States Supreme Court has indicated that an "analysis of the governmental and private issues that are affected" is required.[8]

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[5] *Id.*

[6] *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v Abilene*, 265 U.S. 274 (1924); *cf. Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense"); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (due process requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense... to examine the witnesses against him, to offer testimony, and to be represented by counsel"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Armstrong v. Manzo*, 380 U.S. 545, 549-50, 85 S.Ct. 1187, 1190-91, 14 L.Ed.2d 62 (1965) (failure to notify petitioner of pendency of adoption proceedings deprived him of due process of law); *Goss v Lopez*, 419 U.S. 565, 579, 95 S.Ct 729, 738, 42 L.Ed.2d 725 (1975) ("students facing suspension ... must be given some kind of notice and afforded some kind of hearing"); *Lankford v Idaho*, 500 U.S. 110, 111 (1991) ("Held: The sentencing process in this case violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death.").

[7] *Morgan v. United States*, 304 U.S. 1, 18 (1938).

[8] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

B. Due Process was Violated in this Case

This Court has violated due process rights, of the parties and of citizens in general, by reaching a matter not raised or briefed by the parties and on which no oral argument was conducted.

1. No Party Requested this Relief

No party ever asked for the remedy of setting aside the constitutional requirement of a two-thirds vote of each house to create or increase revenue. No party requested the court to invalidate Art. 4 § 18(2) or even to suspend its operation in this session.

The governor, who initiated this action on July 1, did not request such a remedy. He simply prayed for the court to direct the Legislature to appropriate funds "by a time certain" for a general state appropriations, previously passed by a simple majority, and for the DSA, which had not passed.

This remedy imposed by the Court directing that the Legislature could ignore the two-thirds vote requirement of the Nevada Constitution was simply not raised to allow notice and an opportunity to be heard. The dissenting justice makes clear that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today." (Diss. At 1.)[9] The Governor, too,

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[9] Although an amicus brief of the NEA and other, filed the same day as the answers and this counter-petition, questioned whether this state constitutional provision should be applied, this did not properly present the issue. Evan assuming NEA had been granted leave to file its brief, amici cannot raise new issues on their own. The parties were not called on to brief the amici's points. Although the Court ordered the Governor and other counter-respondents to respond to the counter-petition filled the same day as the amicus brief, no response was ordered to any issues raised by the amici, despite inquiry from the undersigned counsel whether a response to the NEA brief would be requested.

admitted in the Federal District Court that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." The remedy was not raised by the parties.

2. The Court did not Order Briefing on the Issue

Later on July 1, when this Court ordered an answer and briefing, it did not order briefing on whether the two-thirds requirement conflicted with a requirement to fund schools. In that order, this Court did not even mention a supposed irreconcilable conflict between Art. 4 §18(2) and Art. 11, §6, the issue on which the Court would later decide this case. Indeed, the only "apparent conflict" noted in the order was between Art. 4 §18(1), the majority rule for most bills, and Art.4, §18(2), the two-thirds requirement for creating or increasing revenue. While the order requested the parties to address the "impact" of those provisions on the Legislature's ability to appropriate public school system funds, it did not suggest that it was considering invalidating or suspending the application of the constitutional two-thirds requirement.

3. The Court Denied Oral Argument

Counter-petitioners expressly requested oral argument "to assure that the issues involved in these petitions can be fully presented to this Court."[10] (Counter petition at 23.) In the past, when faced with an urgent constitutional issue which affected political issues, this Court has held oral argument and considered the positions of the parties before issuing a decision.[11] It did not do so here.[12]

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[10] Oral argument is allowable in writ petitions. NRAP Rule 21(b) provides that the Court "shall by order advise the parties of the dates on which brief are to be filed, if brief are required, and of the date of oral argument."

[11] *See e.g., Stumpf v Lau*, 108 Nev. 826, 839 P.2d 120 (1992) (the congressional terms limits case); *State Employees Ass'n, In.c. v. Lau*, 110

C. Refer to a District Court for Factual Determination

The Court's decision has apparently turned on matters occurring before the Legislature, the comparative advantages and disadvantages of certain political positions and the extent and effect of the so-called crisis. These matters are outside the proper record before this Court. Although the dissenting justice makes note of several "undisputed features" of the controversy, the facts relied upon by the majority are far from undisputed.

Consequently, this Court should remand or refer this case to the district court for the First Judicial District to make such a record, conduct an evidentiary hearing and factual determinations as necessary for this Court's resolution of this dispute. Such a hearing would consider, among other things, whether there are other options to meeting the constitutional mandate for education funding consistent with the structural provisions of the Nevada Constitution.

Nev. 802, 801 P.2d 1384 (1990) (the abortion ballot question). *See also, Nevada Judges Assoc. v. Lau*, 112 Nev. 51, 910 P.2d 898 (1996) (the judges' term limits case). The importance of fully examining the issue before interfering with the status quo is seen in *Stumpf v. Lau*, where this Court noted that the true nature of the constitutional question before it "began to unfold" and become clear only "[a]fter examining the written responses to the mandamus petition and listening to oral arguments of counsel..." *Id.* at 829, 839 P.2d at 122 (emphasis added).

[12] In contrast to this Court's procedure, the Federal District Court, which heard a related action to enjoin the legislature from passing tax increases by less than two-thirds, was unafraid to allow the parties to present the issues fully. After briefing, that court entertained argument for 90 minutes before all seven active District Judges sitting en banc. The Federal District Court then considered the arguments for two days before issuing its opinion.

III. WHY THIS DECISION IS SO WRONG

A. The Improper Constitutional Analysis Adopted by this Court

While this Court's result, alone, is certainly troublesome, the reasoning used to reach it also disregards established principles and establishes dangerous constitutional precedent far beyond the conflict here. This Court should reconsider its decision.

1. The Constitution Belongs to the People

While this Court finds that "constitutional construction is purely a province of the judiciary," citing *Marbury v. Madison*, it overlooks the points that *Marbury* was about the protection of written constitutions,[13] not the sublimation of constitutional rights to suit the Court's current need. While this Court certainly has the responsibility to interpret the constitution, the People decide what the Constitution says and they have done so unambiguously here: tax increases can only be imposed by a two-thirds vote in each house of the Legislature. The Court may not infringe on that.

Written constitutions, as *Marbury* states, are "the greatest improvement on political institutions,"[14] because the written constitution governs all. Because the constitution is written, it is permanent and cannot be changed easily. Laws will give way to the constitution; the constitution will stand.

The people decide what is important by putting it in the Constitution. The Court does not decide which of those rights are important and which are less so.

2. Difficulty is not an Excuse

This Court made note of whether the Legislature was "able to work" under Article 4, Section 18(2) and whether

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[13] *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

[14] *Id.*

constitutional provisions are "workable". The mere fact that constitutional protections make it more difficult for government officials to perform a certain act there is not reason for setting the constitutional provision aside. Courts must not sacrifice constitutional principle to their own assessment of administrative expediency.[15]

The people wanted it to be more difficult to change the status quo by raising taxes. While many officials and citizens may believe, politically, that the *status quo* should be changed,[16] the means to do so is a constitutional question, not a political one. This Court cannot reach.

3. No Hierarchy of Constitutional Rights

Rather than harmonizing the several constitutional provisions involved in this case, this Court assumed to "prioritize" the provisions, in effect giving the procedural safeguard of Article 4, 18(2) a lower priority in an apparent hierarchy of constitutional rights. There is no such hierarchy of constitutional rights and is improper for the Court to give greater priority to one provision over another. Indeed Courts have wisely rejected such an approach to constitutional jurisprudence.

For example, in *Nebraska Press Ass'n v. Stuart*[17] the United States Supreme Court, specifically refused to "prioritize" between the First Amendment freedom of expression and a criminal defendant's Sixth Amendment right to a fair trial. Declining to favor one amendment over another, the Court evaluated the extent to which the constitutional rights at stake would be served, concluding that a prior restraint on the press was inappropriate when there were other means

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[15] *Gibson v. H.S. Mason*, 5 Nev. 283 (1869).

[16] Compare the academic discussion in the dissent of the signal legislative issue with the approach taken in the majority opinion.

[17] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791 (1976).

available to the trial court to ensure a fair trail.[18] As the Court reasoned:

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.[19]

Similarly, the Unites States Supreme Court has specifically rejected the proposition that there is a "hierarchy" among constitutional rights.[20] The Court firmly declared that there is no "principled basis on which to create a hierarchy of constitutional values."[21]

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[18] *Id.* at 569, 96 S.Ct. at 2807-08.

[19] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561, Ct. 2791, 2803-04.

[20] *Id.*, at 484, 102 S.Ct., at 765. *See also, e.g., Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 628, 109 S.Ct. 2646, 2654 (1989) ("While petitioner and its supporting amici attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights.") (citations omitted); *Bolick v. Roberts*, 199 F.Supp.2d 397, 434 (E.D. Va. 2002) ("This Court chooses to abide by the rule of constitutional law that holds that 'there is no principled basis on which to create a hierarchy of constitutional values.'").

[21] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

4. No Minor "Procedural" Right

This Court provides no authority for its dispositive proposition that constitutional rights that are procedural in nature must give way to constitutional rights that are "substantive" in nature. This subordination of so-called "procedural provisions" to "substantive rights" is anathema to constitutional principles.

At the very least, by dismissing Article 4, § 18(2) as a mere "procedural requirement," this Court overlooks the substantive rights underlying and protected by this procedural guarantee, a key structural provision of the current Nevada Constitution. Other provisions, which could be construed as similarly procedural, are put at risk by this Court's decision. The guarantee of "due process," for example, is oft considered a "procedural" right and, under the Court's approach, could be held give way to other rights. Other rights, too, may be held to be such substandard procedural rights, such as the right to trial by jury. This Court's decision in this case is no different from holding that the structural requirements of bicameralism and presentment are merely general procedural requirements that may be case aside when they become inconvenient.[22] The Court's ruling is both contrary to reason and unsupported by authority.

Undeniably, the right to due process, although it guarantees certain *procedural* rights be afforded prior to the taking of property, is itself a constitutional right.[23] Accordingly, where as here the taking of property through taxation, is at

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[22] *I.N.S. v Chadha*, 462 U.S. 919 (1983).

[23] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.").

issue the dismissal of certain guarantees as "merely procedural" ignores the underlying right.

Clearly the voters of Nevada, in voting for an amendment to the constitution did not envision that they were voting for a mere procedural requirement that could be set aside whenever it became administratively inconvenient. Rather, like the enactment of certain individual rights themselves, the amendment was intended to "ensure that certain principles will not be sacrificed to expediency."[24] The only difference is that they place tax increases "beyond the reach of governmental officials or legislative majorities"[25] not by prohibiting them outright but by ensuring that they be enacted by a two-thirds vote of the legislature or by a vote of the people themselves.

B. The Specific Two-Thirds Requirement for Increasing Taxes Takes Precedence Over the Generalized Requirement that the Legislature Provide Additional Funding for Schools

This Court did not even follow its own rules of statutory

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[24] *Hudson v. Palmer*, 468 U.S. 517, 556-57, 104 S.Ct. 3194k 3216-17 (1984) ("More fundamentally, in its eagerness to adopt a rule consistent with what it believes to be wise penal administration, the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities.").

See generally West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects form the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Ones' right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.")

[25] *Id.*, 319 U.S. at 638, 63 S.Ct. at 1185, 87 L.Ed. at 1628.

construction. This Court created a conflict in constitutional provisions that did not exist,[26] in contravention of its own precedent to reconcile conflicting provisions.[27] It misapplied its own precedent on the interpretive canon that specific provisions take precedence over general provisions, which applies for statutes or provisions related to the same subject matter, not, as here, different subjects.[28] This Court treated the specific two-thirds vote as a general requirement, and the general provision that the legislature provide education funding as a specific requirement, giving preference to the latter in violation of its canon to give effect to specific provisions over more general ones.[29] Finally, this Court ignored the long-established doctrine that in interpreting statues or constitutional provisions of equal weight, the last in time prevails over earlier provisions.[30]

C. An Appropriate Balance: *Let's Put Education First*

As noted above, the present tension between the funding

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[26] The only funding for education mandated by the Nevada Constitution is that "a school shall be established and maintained in each school district at least six months in every year." Nev. Const. art. XI, § 2. Even if this is violated, the Constitution itself specifies a remedy—that the district "may be deprived of its proportion of the interest of the public school fund during such neglect or infraction." *Id.* in other words, the Nevada Constitution itself suggests that the clause is not binding on the State Legislature. Moreover, there were several options to fund education available to the Court that would not have posed any conflict with the two-thirds requirement, as noted by the Governor himself. See Petition for Writ of Mandamus at 10.

[27] *State Div. of Ins. V. State Farm Mut. Auto Ins. Co.*, 995 P.2d 482, 486 (Nev. 2000); *Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991).

[28] *Western Realty Co. v. City of Reno*, 172 P.2d 158 (Nev. 1946); *Wainwright v. Bartless*, 271 P. 689 (Nev. 1928).

[29] *See Gaines v State*, 998 P.2d 166 (Nev. 2000); *Hardison v. State*, 763 P.2d 52, 55 (Nev. 1988).

[30] *Nevada Power Co. v. Haggerty*, 989 P.2d 870, 877 (1999).

of education and the two-thirds voting requirement is a product of the order in which the Legislature chose to make appropriations. Had the Legislature passed funding first, rather than after the general appropriation bill, then there would be no educational crisis. To avoid this problem in the future, education must be funded first. The Court must clarify that this is a requirement. Otherwise, future legislative sessions threaten to repeat the crisis artificially generated in this case.[31]

IV. STANDARD OF REVIEW FOR PETITION FOR REHEARING

Pursuant to NRAP Rule 40(c)(2), this Court may consider rehearings in the following circumstances:

(i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(ii) When the court has overlooked, misapplied or failed to consider a statue, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

At least one commentator has said that appellate courts that decide a case *sua sponte* without hearing from the parties should grant the losing party's request for rehearing as a matter of right.[32]

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[31] Counter-petitioners note that comments of Assemblyman Dina Titus after this Court issued its opinion, as reported in the Las Vegas Sun on July 12, 2003: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA (Distributive School Account, which funds K-12 education) because of this ruling."

[32] Adam A. Milani and Michael R. Smith, "Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts," 69 Tenn. L. Rev. 245, 305-6. As reasoned therein:

> If, despite the concerns raised above, an appellate court decides a case on an issue raised sua sponte without input from the parties, it should grant motions for rehearing filed by the losing

It is ordinarily inappropriate to bring up matters that were not previously raised by the parties in their briefs or at oral argument. In this case, however, the Court imposed a remedy—setting aside the two-thirds requirement—that was neither requested by the Governor, nor raised by any of the other parties. Counter-petitioners were not allowed oral argument or the opportunity to be heard on the issues. Under the circumstances, rehearing should be granted so that counter-petitioners may address the propriety of the remedy imposed by the Court.

V. THE OTHER FEDERAL ISSUES CREATED BY THIS COURT'S *SUA SPONTE* REMEDY

As a result of this Court's decision on the two-thirds requirement, counter-petitioners and their fellow citizens suffered harm when exercising rights protected by the Federal Constitution. Most specifically and acutely, the Assembly counter-petitioners have had their legislative vote diluted, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment.

Individual Nevada voters, too, some residing in the districts of the Assembly counter-petitioners, have had their right to undiluted representation infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. Even those citizens, who voted in 1994 and 1996 for the initiative which added Article 4, § 18(2) to

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party as matter of right. A rehearing would vacate the first decision, and give the parties an opportunity to be heard on the issued decided sua sponte. This procedure would satisfy concerns about due process and the adversary system, and would render moot the abuse of discretion claim. Moreover, this is precisely the type of situation for which the rehearing process was created. If a court fails to grant a rehearing in these situations, the end result is a violation of due process because there was no opportunity to be heard before or after judgment.

the Nevada Constitution, have had their constitutionally-protected right to vote (and to have their votes counted and given effect) infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment and the Republican Guarantee Clause of Article IV. Allowing the Legislature to create and increase taxes without the constitutionally required two-thirds vote will take citizens' property without due process of law, in violation of the Due Process clauses of the Fourteenth Amendment.

A. Dilution of Legislators' Voting Rights

1. Violation of the Legislators' Rights

A state legislator has a federal right not to have his vote diluted or rendered nugatory by actions of the Legislature. The United States Supreme Court explained that such legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes."[33] Other courts, including the Ninth Circuit, have recognized that a state legislature's failure to comply with its own procedures may violate due process.[34] "Fairness (or due process) in legislation is satisfied when the legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation."[35]

In *Bender v. Willamsport Area School District*, the United States Supreme Court expressly suggested, albeit in *dicta*, that members of the state legislative bodies have standing to bring a vote dilution claim that arises from viola-

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[33] *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (involving a federal constitutional amendment.)

[34] *See e.g. Rea v. Matteucci*, 121 F.3d 485, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Conway v. Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997).

[35] *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991).

tions of state law.[36] A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board."[37]

The hypothetical case described in *Bender* is nearly identical to the present case. Article 4, § 18(2) of the Nevada Constitution authorizes legislative action on tax increases "solely" by two-thirds vote. Legislators, who together provided enough votes to defeat any proposed tax increase pursuant to the two-thirds vote requirement of Article 4 are legally entitled to preservation of the effectiveness of their vote. Under the Nevada Constitution, a State Assembly member's vote is 1/15 of the votes necessary to defeat a tax increase. Under the procedure authorize in this Court's opinion, an Assembly member's vote is only 1/21 of the votes necessary to defeat a tax increase—a quite perfect example of vote dilution in violation of the Due Process clause.

2. Violation of the Voters' Derivative Rights

The United States Supreme Court has repeatedly recognized the rights of electors, too, not to have their votes diluted.[38] It is immaterial that dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's vote dilution claim.[39] As the D.C. Circuit aptly noted in *Michel*, "It could not be argued seriously that voters

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[36] *Bender v. Willamsport Area School District*, 475 U.S. 534, 544 note 7 (1986) ('If... state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 439.) (brackets in original).

[37] *Id.*

[38] *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

[39] *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d at 834.

would not have an injury if their congressman was not permitted to vote at all on the House floor."[40] Depriving the voters' elected officials the full weight of the officials' votes is only a difference in degree from the hypothetical embraced by the D.C. Circuit as a self-evident constitutional violation.

"The right of suffrage is 'a fundamental political right, because [it is] preservative of all rights.'"[41] When this Court decided that the Legislature need not abide by Article 4, § 18(2) of the Nevada Constitution, it diluted the representation to which the legislators' constituents are entitled, and, by doing so, diluted the constituents' right to vote. Infringement on the right to vote, including infringement by dilution, violates the First and Fourteenth Amendments of the U.S. Constitution.[42]

B. Violation of Voters' Rights in Adopting the Two-Thirds Rule

The right to vote constitutes more than just the right to show up at a voting booth and cast a meaningless vote. It includes the right to have that vote counted and, if successful, to have the results of the vote given effect.[43]

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[40] 14 F.3d at 626.

[41] *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11thCir. 1995) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

[42] *Id.*

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' ...If, however, 'the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.

Id. (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

[43] *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

This Court's decision nullifies the people's initiative vote in 1994 and 1996 to incorporate Article 4, § 18(2) into the Constitution, at lest whenever there is a budget stand-off involving spending for education. In doing so, the Court deprived the people of their right to an effective vote, protected by the Fourteenth Amendment of the U.S. Constitution. In addition, this Court's remedy will give greater—indeed dispositive—weight to the minority of votes cast against adopting Article 4, § 18(2) such a result violates the Equal Protection Clause of the Fourteenth Amendment.[44] The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote as effectively as wholly prohibiting the free exercise of the franchise.[45] "[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."[46]

C. Violation of the Republican Guarantee Clause

Article IV, section 4 of the United States Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government..." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances,[47] Justice O'Connor noted for the Court in *New York v. United States* "that perhaps not

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[44] *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

[45] *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

[46] *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S. at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

[47] *See Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849)

all claims under the Guarantee Clause present nonjusticiable political questions."[48] "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances."[49] Several courts have acknowledged that the Republican Guarantee Clause might present justiciable questions in the wake of *New York v. United States*, but found that the Clause had not been violated in the particular circumstances at issue in the cases.[50]

This case presents one of the rare instances in which a Republican Guarantee claim is viable. The essence of the claim, drawn from *New York v. United States*, is whether a state's citizens may "structure their government as they see fit."[51] Actions that have a "realistic risk of altering the state's form of government" from what the citizens of the state have themselves adopted have been held to be amenable to Republican Guarantee Clause claims.[52] While in *New York v. United States,* itself, the United States Supreme Court dis-

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[48] 505 U.S. 144, 183 (1992).

[49] *Id.* at 185 (citing L. Tribe, *American Constitutional Law* 398 (2d ed. 1933); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, 122-23 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-89, 300 (1972); D. Merritt, 88 COLUM. L. REV. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-65 (1962)).

[50] *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp. 2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995); *but see State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997) (holding that Republican Guarantee claim is nonjusticiable).

[51] *Kelly*, 69 F.3d at 1511.

[52] *Texas*, 106 F.3d at 667; *New Jersey*, 91 F.3d at 468-69.

missed the Guarantee Clause claim because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government,"[53] this Court's ruling does pose such a risk of altering the state's form of government by altering the people's adoption of a constitutional two-thirds vote requirement for tax increases. The Federal Constitution protects the structural preferences of a state's citizens, serving as sort of a "structural referee."[54]

To avoid crating this conflict and infringing on the rights of Nevada citizens to determine their own constitution and their own form of government, this Court should not impose a remedy that debases the "structural" preferences of Nevada's citizens and invites such federal intervention.

D. Violation of Taxpayers' Due Process Rights

This Court's decision allows that taxpayers will have their property taken without due process of law. "To be deprived of liberty or property without due process of law means to be deprived of liberty or property without authority of the law."[55] "[T]he government operates with greater fairness, and thus greater legitimacy, when it does not change the rules midway through the game."[56]

The constitutional argument is simple and clear. Since 1996, the Nevada Constitution has specified the process by which new taxes can be imposed or existing taxes can be raised: a two-third vote of the members of each house of the

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[53] 505 U.S. at 186.

[54] *Brozonkala v. Virginia Polytechnic Inst. and State Univ.*,169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom United States v. Morrison*, 529 U.S. 598 (2000).

[55] *Rosaly v. Ignacio*, 593 F.2d 145, 150 (7th Cir. 1979).

[56] *Chambers v. Reno*, 307 F.3d 284, 296 (4th Cir. 2002).

Legislature is required.[57] This Court's decision, allowing tax increases with fewer votes, amount to the taking of the property of Nevada citizens and businesses without the process that was due.

E. Violation of the rights of the Legislature

Finally, the recent action of the Nevada Assembly, treating bills increasing taxes as "passed" by a mere majority vote rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution, amounts to a violation by the legislature of Due Process rights guaranteed both to the respondent/ counter-claimants and the voters they represent. State legislators take an oath to support the constitution – both that of Nevada and that of the United States – that is independent of any "permission" which the courts of their state may give them to violate those constitutions.[58] The *sua sponte* decision of this Court, granting a remedy that no party requested, based on supposed conflict between constitutional provisions that simply did not exist, simply cannot provide the legislature with the fig leaf they would like to cover their unconstitutional actions in blatant disregard of the clear command of the Nevada constitution.

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[57] NEV. CONST. ART. 4, §18(2).

[58] *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958); ("[n]o state legislator or executive or judicial office can [wage]war against the Constitution without violating his undertaking to support it"); *cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it").

DATED this 21st Day of July 2003.

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IN THE

Supreme Court of the United States

SHARRON E. ANGLE, *ET AL.*, MEMBERS OF THE NEVADA STATE ASSEMBLY AND THE NEVADA STATE SENATE,*
Petitioners,

v.

KENNY GUINN, GOVERNOR OF THE STATE OF NEVADA, *ET AL.*,*
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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* *Full list of parties on page ii*

QUESTIONS PRESENTED

The questions presented by this case are:

1. Whether this Court should exercise jurisdiction over a moot controversy, one in which Petitioners sought to have any tax increase for educational purposes approved by a two-thirds supermajority vote in both houses of the Nevada Legislature, in which they obtained that sought-after result, and in which they have not met their burden of showing how the facts of this case fall within the well-established exceptions to the mootness doctrine?

2. Whether this Court should exercise jurisdiction over a case in which there is no conflict among the States or the U.S. Courts of Appeals, and where the Petitioners failed to timely raise—and the court below did not entertain or rule on—the question of whether an ostensible misinterpretation of a State Constitution by a State Supreme Court violates the Fourteenth Amendment's Due Process Clause?

3. Whether this Court should exercise jurisdiction to consider an inherently political and non-justiciable question under the Article IV's Republican Guarantee Clause when that question was not presented to or passed on by the court below?

4. Whether this Court should exercise jurisdiction to consider whether "voter dilution" claims are viable under the Fourteenth Amendment's Equal Protection and Due Process Clauses when those claims were not raised in or decided on by the court below and in the absence of any evidence that Petitioners are members of a distinct and identifiable political group or that they were or will likely be the victims of intentional discrimination?

LIST OF PARTIES

PETITIONERS: Members of the Nevada State Assembly: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber; Members of the Nevada State Senate: Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington.

RESPONDENTS: The Governor of the State of Nevada, Hon. Kenny Guinn; The Lieutenant Governor of the State of Nevada, Hon. Lorraine T. Hunt; The Legislature of the State of Nevada; The Speaker of the Nevada Assembly, Hon. Richard D. Perkins; Members of the Nevada State Assembly: Hon. Bernie Anderson, Hon. Morse Arberry, Jr., Hon. Kelvin D. Atkinson, Hon. Barbara E. Buckley, Hon. Vonne S. Chowning, Hon. Jerry D. Claborn, Hon. Tom Collins, Hon. Marcus Conklin, Hon. Jason Geddes, Hon. Dawn Gibbons, Hon. Chris Giunchigliani, Hon. David Goldwater, Hon. Josh Griffin, Hon. Joe Hardy, Hon. William C. Horne, Hon. Ellen M. Koivisto, Hon. Sheila Leslie, Hon. Mark A. Manendo, Hon. Kathy McClain, Hon. Bob McCleary, Hon. Harry Mortenson, Hon. John Oceguera, Hon. Genie Ohrenschall, Hon. David R. Parks, Hon. Peggy Price, Hon. Wendell P. Williams; Members of the Nevada State Senate: Hon. Lorraine T. Hunt, The President of the Senate; Hon. Terry Care, Hon. Maggie Carlton, Hon. Bob Coffin, Hon. Bernice Mathews, Hon. Joseph M. Neal, Jr., Hon. William J. Raggio, Hon. Raymond D. Rawson, Hon. Michael Schneider, Hon. Raymond C. Shaffer, Hon. Dina Titus, Hon. Randolph Townsend, Hon. Valerie Wiener.

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada, dated July 10, 2003, is reported at 71 P.3d 1269 (Nev. 2003) and is reproduced at pages 1a-22a of the Appendix to the Petition for Certiorari. That Court's order denying Petitioners' motion for rehearing, dated September 17, 2003, is reported at 76 P.3d 22 (Nev. 2003) and is reproduced at 23a-50a. There are no opinions from the Nevada trial or intermediate appellate courts, as Respondent Governor Guinn brought his Petition for a Writ of Mandamus against the Nevada Legislature directly to the Nevada Supreme Court pursuant to that court's original jurisdiction.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guarantee Clause of Article IV, § 4 of the United States Constitution provides, in pertinent part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, §18(2) of the Nevada Constitution provides, in relevant part:

> [A]n affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

Article 9, §2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, § 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

On July 1, 2003, the Governor of Nevada sued the Legislature of Nevada in the Supreme Court of Nevada, asking that sovereign court to construe and enforce eight provisions of the Constitution of Nevada. Petition for Writ of Mandamus (filed July 1, 2003), ¶¶1-7, at 2-3.

Most pertinently, the Governor petitioned the court below to construe—and to issue a writ of mandamus directing the Legislature to abide by—three key State Constitutional provisions: Article 11, section 6, which requires funding for the State's public schools and colleges ("the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund"); Article 9, section 2, which requires a balanced budget on an annual basis ("[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year"); and Article 4, section 18(2), which requires supermajority approval of any tax bill ("an affirmative vote of not fewer than two-thirds of the members elected to each House . . . to pass a bill . . . which creates, generates, or increases any public revenue in any form."). Pet. for Mandamus, ¶¶3-5, at 2-3.

The Governor's petition had been preceded by many months of political wrangling between the Governor and the Legislature, between the Legislature's Senate and Assembly, and between members within each House regarding whether, when, and how to fund the State's schools, balance the State's budget, and increase the State's taxes.[1]

Although the Legislature's leaders had hoped that the Legislature would be able to resolve the numerous issues related to the school budget and the general budget—and the taxes needed to pay for both—by the close of the Legislature's 72nd Regular Session,[2] it had been unable to do so,[3] which prompted the Governor to call two Special Sessions to try to complete that task. 7a. Moreover, although the Legislature had enacted taxes sufficient to balance the State's overall budget (excluding the education budget) and although it had approved a separate education budget, it was unable to agree on a tax bill needed to generate sufficient revenues to fund education at the level it had deemed necessary, falling one vote short of the required supermajority in one House. 6a-8a.

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[1] *See, e.g., State of the State Address, Remarks by Governor Kenny C. Guinn to the 72nd Session of the Nevada Legislature, January 20, 2003;* Brendan Riley, *Governor: Nevada $275 million budget crisis 'worse by the day,'* Las Vegas Sun, Aug. 15, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/text/2002/aug/15/081510482.html; Ray Hagar, *Guinn asks for 3 percent cuts,* Reno Gazette-Journal, Aug. 15, 2002, *available at* http://www.rgj.com/news/stories/html/2002/08/15/21693.php; Geoff Dornan, *Shortfall mandates would hit university system hard,* Nevada Appeal, Aug. 16, 2002, *available at* http://www.nevadaappeal.com/apps/pbcs.dll/article?Site=NA&Date=20020816&Category=NEWS&ArtNo=208160104&Ref=AR).

[2] Erin Neff, *Guinn Sets Friday Budget Deadline,* Las Vegas Sun, May 15, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/may/15/515086541.html; Erin Neff, *Alternative Business Tax in the Works,* Las Vegas Sun, May 20, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/may/20/515105673.html. *Cf.* Ray Hagar & Tim Anderson, *Lawmakers Scramble to Pass Tax Package Before Deadline,* Reno Gazette-Journal, Jun. 1, 2003.

[3] When the 72nd Regular Session of the State Legislature closed, $3.26 billion had been appropriated for various State functions. 7a. In accordance with Art. 9, §2's requirement that the budget be balanced, revenues were determined sufficient to meet that obligation. *Id.* Unfortunately, funding for education had not been approved. 7a-8a.

The leaders of both Houses saw the impasse as a temporary and relatively benign occurrence and expected to be able to resolve it in time for the opening of the upcoming school year. Nevertheless, despite their expectations and best efforts, when the Legislature did not resolve that impasse as quickly as the Governor deemed desirable, he declared an educational, constitutional, and fiscal crisis, and instantly branded the Legislature as the sole cause of the crisis. Memorandum in Support of Petition for Writ of Mandamus, at 10.

Thus, as grounds for his mandamus petition, the Governor asserted that the "Legislature's failure to adhere to its [State] constitutional duties imperil[ed] the State's educational system, place[d] the State on the brink of a fiscal crisis, and render[ed] the relevant portions of the Nevada Constitution meaningless." *Id.*

The Nevada Supreme Court, which was well-aware of the months-long political impasse – and the often red-hot rhetoric used by contending "public interest" lobbying groups[4] – and which had been alerted to the imminent filing of the Governor's petition,[5] entered a briefing order the same day that petition was filed. Order Directing Answer (filed July 1, 2003).

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[4] *See, e.g., State of the State Address, Remarks by Governor Kenny C. Guinn to the 72nd Session of the Nevada Legislature, January 20, 2003;* Jennifer Knight, *UNLV to cut classes to meet Guinn request,* Las Vegas Sun, Aug. 28, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/lv-ed/2002/aug/28/513911356.html; Sean Whaley, *State Budget Crisis: Conservatives: Cut budget, don't raise taxes; Programs can't be cut anymore, many others say,* Las Vegas Review-Journal, Jan. 12, 2003, *available at* http://www.reviewjournal.com/lvrj_home/2003/Jan-12-Sun-2003/news/20405972.html; Alexander Marriott, *Despite budget crisis, Nevada State Legislature vetoes new taxes,* Rebel Yell (UNLV student newspaper), Jul. 7, 2003, *available at* http://www.ryunlv.com/news/2003/07/07/Opinion/Despite.Budget.Crisis.Nevada.State.Legislature.Vetoes.New.Taxes-446417.shtml.

[5] Geoff Dornan, *Hope Dims for Tax Plan Passage, Nevada Appeal,* Jun. 29, 2003, *available at* http://www.nevadaappeal.com/apps/pbcs.dll/artikkel?SearchID=73163024723757&Avis=NA&Dato=20030629&Kategori=NEWS&Lopenr=306290102&Ref=AR; Brendan Riley, *Nevada Senate Leaves Assembly to Struggle with Tax Impasse,* Las Vegas Sun, Jun. 29, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/jun/29/062910619.html. *Cf.* Associated Press, *Nevada Lawmakers Work on Tax Plan, Deadline Near, Reno Gazette-Journal,* Jun. 27, 2003.

That Court's order noted "an apparent conflict" between the material state constitutional provisions, directed all parties to "address the dynamic tension created" by those provisions, and requested all parties to "identify and address all available means for resolving the impasse . . . ." *Id.*, at 3-4.

None of the briefs filed by the Governor, the Legislature, or various individual legislators—who collectively comprise the Petitioners and Respondents before this Court—raised any federal constitutional issues. Instead, their briefs focused exclusively on such factual questions as whether a budget crisis truly existed (and thus whether the case was ripe) and on such state constitutional questions as whether the Legislature and its members had violated sundry provisions of the state constitution, whether the individual legislators were immune from suit for putative violation of their official duties, whether the Governor's petition presented a non-justiciable political question, and whether that petition (and the State Supreme Court's entertainment and resolution of it) violated the State's separation of powers doctrine.

On July 10, the court below found that the Legislature, "faced with a rapidly increasing population" and "record-high needs," 9a, had not only "failed to fund education in the 72nd Regular Session and in two special sessions," but was "evidently in a deadlock over the means of raising the necessary revenues." 5a; *see* 13a-14a. According to that court, that "deadlock" had not merely "precipitated an imminent fiscal emergency" and "an unprecedented budget crisis," but also had the effect of threatening the State's longtime fiscal health as it "jeopardized" the "State's bond rating . . . ." 9a. Most immediately, the court opined that the deadlock had the potential of imperiling the education of the State's children as school "[t]eachers ha[d] not been hired," and "[e]ducational programs ha[d] been eliminated . . . ." *Id.*; *see* 13a-14a.

The court further determined that the Legislature "failed to fulfill its constitutional mandate" to balance the budget and provide funds for the schools "because of the conflict among several provisions of the Nevada Constitution," which the court, in its "judicial role as interpreter[] of the Nevada Constitution," felt an obligation to "reconcile." 5a-6a.

As the court explained:

> At the heart of this case is the two-thirds supermajority requirement for revenue-raising legislation. [Art. 4, §18(2)]. The Legislature is unable to fulfill its constitutional duties to fund the public schools [Art. 11, §6] and to adopt a balanced budget [Art. 9, §2] because it has not met the two-thirds vote requirement. The Legislature's failure to provide funds for public education, to pass the concomitant revenue generating package and to balance the state's budget after having had the opportunities of one general session and two special sessions to do so, [led] to the inevitable conclusion that it is futile to order the Legislature to debate further within the parameters of Article 4, Section 18(2). As constitutional construction is purely a province of the judiciary, [the court] undert[ook] to resolve the tension between the Legislature's constitutional obligation to fund public education and the constitutional provisions requiring a simple majority to enact appropriations bills but a two-thirds majority to generate or increase public revenue to fund those appropriations.

9a-10a (footnotes omitted).

The court noted that while it had no constitutional authority "to make appropriations, levy taxes, [or] balance the state's budget," it had the historic "province" and duty to "exercise its judicial function of interpreting the [State] Constitution" whenever "constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another . . . ." 10a (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

The court explained that in fulfilling its traditional duty as the interpreter and guarantor of the State Constitution, it had applied the ordinary tools of construction to the three provisions at issue in this case, 6a, and thus had studied their text and history in detail. 11a-14a. The court concluded that in

accordance with this long-established approach the venerable budget-balancing and school-funding requirements were "substantive and specific" and therefore were entitled to preference over the newer "procedural and general constitutional requirement of passing revenue measures by a two-thirds majority . . . ."6a. *See* 13a-14a.

The court added that its use of this standard approach to constitutional construction inexorably led to its ultimate conclusion: that the general and "procedural requirement must give way to the substantive and specific constitutional mandate to fund public education." *Id.* Consequently, the court granted the Governor's petition against the Legislature and directed "the Legislature . . . to proceed expeditiously with the 20th Special Session under simple majority rule." *Id.*

Three days after the lower court's decision, the Nevada Assembly amended and then approved Senate Bill 6 ("SB6"), a previously proposed tax bill, by a 26 to 16 vote, *i.e.*, less than a two-thirds margin, and then transmitted that bill to the Nevada Senate for reconsideration.[6]

The next day, the Nevada Senate, sitting as a committee of the whole, took up consideration of SB6 as it had been amended and approved by the Assembly; the Senate duly voted to reject rather than endorse the Assembly's amendments. As a result, and as discussed below, SB6 never became law.

Later that same day, 24 Nevada assemblymen and senators, including all of the Petitioners herein, filed a complaint in the

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[6] Contrary to Petitioners' representations, even in the absence of the decision below, this action would not have violated the Nevada Constitution, because the Nevada Assembly could later have obtained a two-thirds vote on final passage of SB6. For example, since the Senate later refused to concur in the Assembly's amendments to SB6, and the Assembly refused to recede from its amendments, SB6 could have been referred to a conference committee. SB6 as amended by a conference committee would have been considered again by both houses and could have then been approved in both houses by a two-thirds vote. Thus, the final passage of SB6 would have been in compliance with the Nevada Constitution even in the absence of the decision below, and the earlier vote of 26 to 16 would not have been a final vote of final passage in contravention of the State's Constitution even in the absence of the decision below.

U.S. District Court for the District of Nevada, applying for and immediately obtaining an *ex parte* temporary restraining order prohibiting the Legislature from giving any effect to the Assembly's passage of amended SB6 until the matter could be heard by all of the District Court's active judges four days later. In the interim, the Governor and the Legislature filed briefs opposing the TRO.

On July 18, 2003, the District Court, sitting *en banc*, dissolved the TRO and dismissed the case in its entirety. The District Court plaintiffs immediately filed a Notice of Appeal with U.S. Court of Appeals for the Ninth Circuit, together with an emergency motion for a preliminary injunction pending appeal. The Ninth Circuit denied the emergency motion the same day; the appeal remains pending.

The decision of the District Court *en banc* to dissolve the TRO, combined with the Ninth Circuit's denial of the emergency motion, relegated the fate of SB6 back into the hands of the Nevada Senate, which, pursuant to the July 10 decision of the court below, had been directed to expeditiously approve such bills by a simple majority vote, rather than by a two-thirds margin. Before the Senate could do so, however, it needed to approve the Assembly's amendment to SB6. It rejected that option, however, and instead returned SB6 to the Assembly for the latter's reconsideration. The Assembly then voted not to recede from its amendments to SB6.

Pursuant to the Nevada legislature's standard operating procedures, neither of these actions – specifically, the Senate's decision not to concur in the Assembly's amendments to SB6, and the Assembly's decision not recede from those amendments – would have required a two-thirds vote by either House, even in the absence of the decision below. Significantly, neither House took any further action on SB6; it was not enrolled or enacted by the Legislature, and it was not transmitted to the Governor for his signature, and so never became law.[7]

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[7] On July 20, the Assembly passed Senate Bill 5 ("SB5") by a 26 to 14 vote, *i.e.*, less than a two-thirds margin, and then transmitted that bill to the Senate. Contrary to Petitioners' representations, because SB5 simply

On July 21, 2003, the 24 members of the Nevada Legislature who had filed suit in the federal district court and who are the Petitioners herein, moved the court below to vacate its July 10 decision; they simultaneously petitioned that court for rehearing of that ruling and moved for an emergency motion for a stay of that ruling.

Finally, however, on the same day, a new tax bill, SB8, was introduced and passed in final form by both the Assembly and the Senate, this time by a two-thirds margin in each House.

On September 17, the Nevada Supreme Court denied the Petition for Rehearing, the motion to vacate, and the emergency motion for a stay, determining that the Legislature's July 21 enactment of SB8 – by the two-thirds margin called for by Art. 4, §18(2) – had mooted the case in its entirety. 46a.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied because this case is moot and non-justiciable. Petitioners sought to have any tax increase for educational purposes approved by a supermajority vote in both houses of the Nevada legislature; that has occurred, which leaves this Court with nothing to do but provide an advisory opinion on an abstract political question in a case with no actual, live controversy. Furthermore, contrary to Petitioners' contentions, neither the "capable-of-repetition, yet-escaping review" nor the "voluntary cessation" exceptions to the mootness doctrine fit the facts of this case.

As the court below held, 45a, the instant dispute was rendered moot when the State Legislature enacted a tax measure in accordance with the requirements of the three key provisions of the State Constitution at issue: the educational funding provision (Art. 11, §6), the balanced budget

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amended SB6 and was not a distinct tax bill, and because SB5 did not have the effect of increasing the overall revenue to be raised by SB6, it did not require approval by a two-thirds vote, without regard to the decision below. Nevertheless, because the Assembly had amended this bill, too, it likewise could not become law without further concurring action by the Senate. The Senate did not, however, at any point thereafter ratify, concur, approve, or otherwise act on SB5, so it, too, was never enrolled, enacted, or transmitted to the Governor for his signature, and therefore never became law.

requirement (Art. 9, §2), and the supermajority requirement for tax measures (Art. 4, §18(2)). Petitioners speculate that the conflict that gave rise to the original dispute might reoccur someday and thus they are entitled to an advisory opinion from this Court on how the Nevada Legislature might best comply with the Nevada Constitution if a similar conflict should ever occur. This Court should refuse Petitioners' invitation to provide an abstract declaration of principles.

Even if this case were not moot, it still would not satisfy any of the traditional criteria for certiorari, as there is no conflict among the States or the U.S. Courts of Appeals, and as the Petitioners failed to timely raise—and the court below did not entertain or rule on—any of the federal questions they present in the Petition.

Of equal importance, the questions Petitioners now raise for the first time in this case are either inherently political and non-justiciable (the Republican Guarantee Clause question), an affront to Our Federalism (the question of whether a State Supreme Court's misinterpretation of the State's Constitution can violate the Fourteenth Amendment's Due Process Clause), or simply frivolous and unsupported by the record (the question of whether "voter dilution" can violate the Fourteenth Amendment's Due Process and Equal Protection Clauses in the absence of any evidence at all that Petitioners are members of a distinct and identifiable political group or that they were or will likely be the victims of intentional discrimination).

Lacking any adequate and legitimate grounds for gaining this Court's jurisdiction, Petitioners improperly ask this Court to grant certiorari not because of any conclusive actions taken or pending by the Nevada Governor or the Nevada Legislature, the principal Respondents herein, but rather in order to have this Court review and reverse an interpretation of the Nevada Constitution by the Nevada Supreme Court. In essence, Petitioners are asking this Court to assert supervisory control over that court because they are certain that the latter "ignore[ed] or misappl[ied] its own well-established canons of construction," Pet. at 11, in assessing the relative importance of what they denominate as a "key structural provision of the State Constitution," *id.*, at 10, in contrast to that court's decision

to accord higher priority to other provisions of the Nevada Constitution. *See id., at* 16-22; 11a-14a.

To reach Petitioners' issues, this Court must make two unprecedented, unjustified, and improper leaps of faith: *first*, that this Court has the authority to construe the Nevada Constitution and is, in fact, better able and better positioned to do so than the Nevada Supreme Court; and *second*, that the Nevada Legislature never would have enacted a tax increase by the necessary two-thirds vote if the Nevada Supreme Court had not ruled that a simple majority would satisfy State Constitutional requirements.

As to the first proposition, this Court's precedents unmistakably establish that state supreme courts are the final arbiters of their own state constitutions. As to the second, this Court has long said that it will not engage in the kind of academic exercises in rank speculation that Petitioners here seek.

From the earliest days, this Court has held that construction of a state constitution properly rests with the highest court of a state. Our Federalism counsels that this Court not abandon this settled jurisprudence. Under Petitioners' fanciful theory, however, this Court will become the court of last resort for any party disappointed with a state supreme court's interpretation of its own State Constitution. Such a theory is palpably at odds with our Nation's federalist design. Neither the Guarantee Clause nor the Fourteenth Amendment's Due Process and Equal Protection Clauses—which Petitioners contend should be read as creating a form of reverse incorporation of state constitutional provisions and thereby render them federal—provides this Court with jurisdiction over the Nevada Supreme Court's construction of its own state constitution.

I. THIS CASE IS MOOT

As the Nevada Supreme Court ruled, this case "became moot when the Legislature passed the revenue-generating bills by the requisite two-thirds vote." 45a. Although Nevada caselaw on mootness follows this Court's own jurisprudence,[8]

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[8] *See, e.g., City of Reno v. Second Jud. Dist.*, 78 P.2d 101, 101 (Nev. 1998)("[n]o rule of law is better settled than that courts will not determine

this Court is not bound by that decision. Nevertheless, there are three reasons why this Court should reach the same conclusion and deny the instant Petition.

First, the purportedly "unconstitutional action," Pet. at 10—the "passage" of SB6 (a bill that would have increased taxes) by a simple majority vote in one House of the bicameral Nevada Legislature, *id.*—never ripened into law. In fact, that "action" was never enrolled or ratified by the Legislature as a whole, never transmitted to or signed by the Governor, never implemented, and never became law.

Second, there is no current, live controversy between the parties. Although the court below construed and reconciled conflicting provisions of the Nevada Constitution so as to authorize the Legislature to pass an educational tax bill for the 2003 legislative session by a simple majority vote, the Legislature never did so. Instead of passing a tax increase by an ostensibly unconstitutional simple majority vote, the Legislature enacted the tax increase incorporated in SB8 by an unquestionably constitutional two-thirds margin.

Finally, this Court cannot give any effectual relief to Petitioners. These reasons are discussed in detail below

As an initial matter, this Court has emphasized that the case-or-controversy requirement of Art. III, § 2 limits its jurisdiction to actual, "live" disputes between adverse parties, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), *i.e.*, cases where the Court can "resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)(citation omitted).[9] This means not only that "the plaintiff

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moot or abstract questions," citing *California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893)); *Roe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986)("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief," citing *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1973)); *Bd. of County Comm'rs, Clark County v. White*, 729 P.2d 1347, 1349 (Nev. 1986)(Nevada "has long adhered to the general rule that denies review to cases rendered moot by the happening of events subsequent to the initial controversy.").

[9] These "'requirement[s] subsist through all stages of federal judicial proceedings, trial and appellate,'" including on petitions for writs of certiorari. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)(citation omitted). *See also*

must have suffered, or be threatened with, an actual injury traceable to the defendant," *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), but that there also must be a "'substantial likelihood' that the requested relief will remedy the alleged injury." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2001)(citation omitted). *See Spencer*, 523 U.S., at 7.

Where, as here, these twin conditions have not been met, the case is moot and non-justiciable. Thus, this Court has held that it has no authority to answer recondite questions or "give opinions to abstract propositions," *Calderon v. Moore*, 518 U.S. 149, 150 (1996)(*per curiam*), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895), to venture views on "'a hypothetical state of facts,'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)(citation omitted), to "declare principles or rules of law which cannot affect the matter in issue," *Mills, supra*, or "'to decide questions that cannot affect the rights of litigants.'" *Preiser*, 422 U.S., at 401. These principles are especially appropriate in this case, where Petitioners seek declaratory relief but where the underlying dispute lacks "'sufficient immediacy and reality to warrant the issuance of a declaratory judgment,'" *id.* at 402 (citation omitted), and where the decision below rests "on adequate and independent state grounds," which places nearly insurmountable "'limitations'" on the Court's jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)(citation omitted).

Evidently fearing that this Court might concur with the court below, 45a-46a, and thus conclude that their case is moot, Pet. at 27, Petitioners advance five reasons why it is not. Although two of those arguments invoke well-established exceptions to the mootness doctrine—"voluntary cessation" and "capable-of-repetition, yet-evading-review"—and accordingly will be addressed below, Petitioners' remaining, skeletal theories[10] have never been endorsed by this Court (or

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Church of Scientology of Calif. v. Zolin, 506 U.S. 9, 12 (2002); *Calderon v. Moore*, 518 U.S. 149, 150 (1996)(*per curiam*); *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974); *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

[10] Petitioners conclusorily contend that this case is not moot because: "[f]irst," the decision below is a "'loaded weapon,'" and thus could be dangerous to someone, sometime in the future, Pet. at 26 (citation omitted); "[s]econd," the bill that was "passed" by a single House but never enacted

any other), and Petitioners advance no reasons why this Court should embrace them now.

A. The "Voluntary Cessation" Exception Does Not Apply

Petitioners concede that the Nevada Legislature has "voluntar[ily] ce[ased]" the "complained-of conduct," *i.e.*, it did not enact—and, in fact, never has enacted—a tax increase without the requisite supermajority vote. Pet. at 26. Petitioners nevertheless maintain that "however much the new" law, SB8, that was enacted by the Nevada Legislature by a two-thirds vote "'*may reduce the practical importance of this case*, it does not completely remove the controversy'" because the entire Legislature might "repeat [the mistake] in the future." *Id.* (emphasis added), citing *United States v. Concentrated Phosphate Exp. Ass'n.*, 393 U.S. 199, 203 (1968), and *Friends of the Earth, Inc. v. Laidlaw Env. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Petitioners' reliance on *Concentrated Phosphate* and *Friends of the Earth* is misplaced, though, as each case involved wrongful conduct by private parties. As courts and commentators have remarked, and as this Court's cases consistently demonstrate, "cessation of allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir.1988), *appeal dismissed*, 503 U.S. 916 (1992)(citing 13A, C. Wright, A. Miller & E. Cooper, FED. PRAC. & PROC. §3533.7, at 353 (2d ed. 1984)). Thus, while a skeptical posture might be "appropriate . . . for cases between private parties, . . . this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, '[w]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine.'" *Fed'n of Adver. Indus. Rep's, Inc., v. City of Chicago*, 326 F.3d 924,

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into law constitutes ostensibly historic "violat[ions]" of Petitioners' rights to Due Process, Equal Protection, and Republican Form of Government (albeit violations with no current consequences), *id.*; and "[f]inally," the refusal by the court below to vacate its previous decision interpreting and reconciling three State Constitutional provisions violated "its customary practice," which "thus causes ongoing harm," "exacerbates the due process problems," and "continue[s] to undermine a key structural limitation that the citizens of Nevada have imposed on their government." Pet. at 28.

929 (7th Cir. 2003)(citations omitted). "[S]uch self-correction provides a secure foundation for a dismissal based on mootness." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990).

Indeed, as Profs. Wright, Miller, and Cooper have noted, "[c]ourts are more apt to trust public officials . . . to desist from future violations."[11] Justice O'Connor has explained why:

> [I]t is not at all reasonable to suppose that the legislature has repealed or amended a challenged law simply to avoid litigation and that it will reinstate the original legislation if given the opportunity. This is especially true where . . . the law has been replaced—no doubt at considerable effort and expense—with a more narrowly drawn version designed to cure alleged legal infirmities. *We ordinarily do not presume that legislative bodies act in bad faith.*

N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 677 (1993)(O'Connor, J., dissenting; emphasis added).

Not surprisingly, this Court has invariably held that challenges to assertedly unconstitutional statutes become moot whenever such statutes have expired or been repealed,[12] or,

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[11] *See* 13A FED. PRAC. & PROC., *supra*, §3533.7 (2d ed. 1984 & 2003 Supp.), and *id.*, nn.9-11, citing *Preiser*, 422 U.S., at 402-403, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *County of L.A. v. Davis*, 440 U.S. 625 (1979).

[12] *E.g., Heller v. Doe*, 509 U.S. 312, 333 n.4 (1993)(Due Process challenge "mooted by the repeal of the provision at issue")(citing *Dept. of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986), and *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977)); *Burke v. Barnes*, 479 U.S. 361, 363-65 (1987)(challenge moot because statute had expired); *Bryan v. Austin*, 354 U.S. 933, 933 (1957)(*per curiam*)(challenge seeking declaratory and injunctive relief mooted by statutory repeal); *New Orleans Flour Insp. v. Glover*, 160 U.S. 170, 170 (1895) (repeal). *See also Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)("As a general rule, if a challenged law is repealed or expires, the case becomes moot" unless "it is virtually certain that the repealed law will be reenacted"); *Am. Legion Post No. 7 v. City of Durham*, 239 F.3d 601, 606-07 (4th Cir. 2001); *Citizens for Resp. Gov't v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000); *D.H.L. Assoc. v. O'Gorman*, 199 F.3d 50, 55 (1st Cir. 1999); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *Associated General Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 66 (2d Cir. 1994).

more analogously to this case, have been replaced by materially different statutes.[13] Thus, the "longstanding rule" is that if a "challenged statute no longer exists," or no longer exists in its original form, "there ordinarily can be no real controversy as to its continuing validity," *id., at* 670, with the result that "an order enjoining its enforcement would be meaningless." *Id.* "In such circumstances, it is well-settled that the case should be dismissed as moot." *Id.*

The exceptions to this line of cases and this "longstanding rule" are few and inapposite. Thus, a case is not moot where the record evidence establishes that the repeal of a challenged statute, the suspension of a challenged ordinance, or a moratorium on challenged regulation or practice is disingenuous, equivocal, and temporary,[14] or where a repealed

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[13] *E.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 474 (1990) (challenge rendered moot by amendment); *Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989)(overbreadth challenge to criminal statute mooted by amendment that eliminated any possibility that it would either affect the defendant or could chill the rights of others); *Galioto, supra*, 477 U.S., at 559-60 (equal protection challenge mooted after amendment eliminated the allegedly discriminatory provisions); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*)("substantia[l] amend[ment]" of a challenged regulation completely mooted controversy over its validity); *Kremens, supra*, 431 U.S., at 128-30 (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Fusari v. Steinberg*, 419 U.S. 379 (1975)(Due Process challenge to unemployment compensation procedures mooted by amendment establishing additional procedural protections); *Allee v. Medrano*, 416 U.S. 802, 818-20 (1974)(where criminal statutes declared unconstitutional were replaced by "more narrowly drawn" versions, case was moot absent pending new prosecutions). *See also Diffenderfer v. Central Baptist Church of Miami, Inc.*, 404 U.S. 412, 414-15 (1972)(*per curiam*); *Bd. of Pub. Util. Comm'rs v. Compania General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919); *Berry v. Davis*, 242 U.S. 468, 470 (1917); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

[14] *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999)(challenge remained alive "[b]ecause the State's 1998 law provides that the State will revert to the [challenged] 1997 [law] upon a favorable decision of this Court"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 99-102 (1983)(challenge to use of "chokeholds" was not mooted by city's moratorium on the practice, where city conceded that the moratorium was temporary, and warned that it might soon resume the practice); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.11 (1982)(though city had repealed a challenged ordinance, this

ordinance or statute has already been replaced with one that has not been "sufficiently altered" from its predecessor. *Id.*, at 662 n.3. Although Petitioners cite an amicus brief to support their speculation, Pet. at 26, that if a budget crisis recurs in Nevada the entire Legislature will doubtlessly approve a tax increase by less than a two-thirds majority, this Court has never credited such conjecture as sufficient grounds for maintaining jurisdiction in an otherwise moot case.[15]

B. The "Capable-of-Repetition, Yet-Evading-Review" Exception Does Not Save this Case from Mootness

Petitioners contend that even if the "voluntary cessation" exception does not save their case from mootness, Pet. at 28, sundry "facts"—*e.g.*, that *(1)* a budget crisis might recur in Nevada, sooner or later; *(2)* such a crisis could cause the State's schools not to be funded; *(3)* a simple majority of both Houses of the Nevada Legislature might decide to levy higher taxes to cure a general budget crisis and a particular school funding

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Court declined to find the case moot because city had announced it would reenact the ordinance if the case was dismissed). *See also id.*, 455 U.S., at 296, n.* (White, J., concurring and dissenting in part); *Bell v. Wolfish*, 441 U.S. 520, 542 n.25 (1979); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).

[15] *See Preiser, supra*, 422 U.S., at 403 ("remote and speculative" consequences insufficient to defeat mootness); *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973)("pleadings must be something more than an ingenious academic exercise in the conceivable."); *Hall v. Beals*, 396 U.S. 45, 49 (1969)("speculative contingencies afford no basis for our passing on the substantive issues [Petitioners] would have us decide . . ."); *Bd. of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)(same). *See also Fed'n of Adver. Indus. Rep's, supra*, 326 F.3d, at 930 ("Rather than presuming bad faith, we have repeatedly held that the complete repeal of a challenged law renders a case moot, unless there is [record] evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar."); *Nat'l Black Police Assoc., supra*, 108 F.3d, at 349 ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted."); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997)(amendment mooted challenge where the state had expressed no intention to reenact the prior law); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995)("[D]efendants' assert[ion] that the claims are not moot because the . . . legislature remains free to reinstate the old law" is too conjectural and speculative to avoid a finding of mootness").

crisis; and *(4)* at least one House might not pass such taxes by a two-thirds margin—collectively "*demonstrate* that the case is capable-of-repetition, yet-evading-review, an exception to the mootness bar." Pet. at 28 (emphasis added)(citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

The "capable-of-repetition" exception does not apply here, inasmuch as Petitioners have both misread the cases elucidating this doctrine and failed to show that the qualifying "facts" in this case are truly as they portray them to be.

As this Court recently stressed, a party seeking to take advantage of the capable-of-repetition exception must do much more than merely claim, or even clearly prove, that allegedly wrongful conduct will recur.

> [T]he capable-of-repetition *doctrine applies only in exceptional situations*, where the following *two circumstances are simultaneously present*: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, *and* (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Spencer, supra, 523 U.S. at 17-18 (emphases added; internal brackets, quotation marks, and citations omitted).

Petitioners satisfy neither of these conditions, let alone both. *First*, they have not introduced any evidence demonstrating the "reasonable likelihood" that the same putative misconduct will recur and that they will be the victims of such misconduct. Instead, they merely allege that it is possible, ascribing improper motive to a legislative body that this Court will not presume is harbored. Nor have they shown that that the same legislators are reasonably likely to hold office at the next opportunity to develop a budget, to oppose any tax measure calculated to balance an approved budget, and to constitute part of a greater than one-third minority.

Second, even assuming, *arguendo*, that the dominoes would fall on Petitioners exactly as they predict, they have not asserted—much less demonstrated—*any* likelihood that a new budget-funding-tax crisis would be "too short" in "duration . . .

to be fully litigated prior to cessation or expiration." *Id.* In fact, Nevada law maximizes the chances for timely review.[16]

Finally, this case is unlike ones challenging electoral practices, "which are quintessential examples of repeated disputes of such short duration that they are 'capable-of-repetition, yet-evading-review.'" *Id.* at 18 (citation omitted).[17] Most tellingly, this case is unlike *Southern Pacific* itself, the 1911 case that inaugurated the exception, and a case that Petitioners cite but do not describe. Unlike *Southern Pacific,* the conduct that Petitioners assail here does not involve a "*short term [administrative] order[],*" which was "virtually impossible to litigate the validity of . . . prior to its expiration." 219 U.S. at 515. Because of that fact, "and the additional fact that the same party would in all probability be subject to the same kind of order in the future, review was allowed even though the order in question had expired by its own terms." *Id.*

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[16] The procedural safeguards incorporated in the Nevada Constitution include, Art., 4, §18(1), which minimizes the possibility of stealthy legislation by requiring that "[e]very bill . . . must be read by sections on three several days, in each House unless in case of emergency. The reading of a bill by sections, on its final passage, shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journals of each House." The Nevada courts have been able to provide security to forestall the implementation of suspect legislation before timely judicial review. *See, e.g., Binegar v. Eighth Judicial Dist.,* 915 P.2d 889, 892 (Nev. 1996)("*in almost every case challenging the constitutionality of [a criminal statute] the defendant will request this court to stay* the application of the statute to his or her case pending an opinion by this court determining whether the statute is constitutional *[and] this court will grant the stay.*"); *Boyne v. State ex rel. Dickerson,* 390 P.2d 225 (Nev. 1964).

[17] *See, e.g., Morse v. Repub. Party of Virginia,* 517 U.S. 186, 235 n.48 (1996) ; *Anderson v. Celebrezze,* 460 U.S. 780, 784 n.3 (1983) ; *Storer v. Brown,* 415 U.S. 724, 737 (1974); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). *Cf. Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972).

Nor is this case anything like the two other classic examples of the exception: *Sosna v. Iowa,* 419 U.S. 393, 400 (1975)(challenge to short-term state residency requirement for divorces was not moot because the barriers to potential divorcees were "capable-of-repetition, yet-evading-review"); and *Roe v. Wade,* 410 U.S. 113, 125 (1973)(finding "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.").

In sum, Petitioners have not shown this case to be anything like one of "exceptional situations" which are capable of both being repeated and evading review, *Spencer*, 523 U.S. at 17, and they have not demonstrated how this case satisfies *Spencer*'s dual and "simultaneous" requirements. *Id.*

II. THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THE QUESTIONS PRESENTED WERE NOT RAISED OR DECIDED BELOW

This Court's Rule 14.1(g)(i) mandates, in pertinent part, that "[i]f review of a state-court judgment is sought" on a petition for certiorari, the petition "shall contain":

> specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have not complied with this command.

The reasons why Petitioners have defaulted on this requirement are self-evident. *First*, the court below did not "pass on" the federal questions presented in the Petition, either in its initial opinion of July 10, 2003, or its subsequent opinion of September 17 rejecting Petitioners' demand for rehearing. *Second*, Petitioners never raised these questions in a "timely and proper[]" manner in their initial brief to the court below; rather, they raised them tardily and improperly in their petition for rehearing from the July 10 decision.

These flaws are fatal. With extremely few exceptions, this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257" that it will "not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the

decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997)(*per curiam*)(citations omitted).[18]

Petitioners concede by their silence that the court below did not reach any of the three questions on which they now seek certiorari. Nor have Petitioners met their burden of showing that these questions were properly presented to that court. Where, as here, a state's highest court is silent on the federal questions presented in a petition for certiorari, this Court invariably "assume[s] that the issue[s] w[ere] not properly presented," *id.* (citation omitted), with the result that "the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question[s] that [are] sought to be presented here.'" *Id.* at 87.

Although this Court has identified at least three ways in which a petitioner can satisfy this requirement, *id.*, Petitioners have failed to take advantage of any of them. In short, Petitioners have done nothing to meet their "burden" under *Adams* and have done nothing to demonstrate that they complied with the applicable state rules for raising their federal constitutional claims before the court below. Nor have they explained why their failure to comply with those rules was not an adequate and independent ground for the court below to disregard that claim. *Id.*

Petitioners may argue that they should be excused for failing to raise below the issues they have now put before this

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[18] *E.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, [illegible] (1940). This rule also serves the interests of comity, as "'it would be unseem[illegible] our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S., at90 (citations omitted). As in *Adams*, the court below "has an undeniable interest in having the opportunity to determine in the *first* instance whether its construction of the [state] [c]onstitution comports with the federal constitution." *See id.* This Court's traditional deference to a state highest court on such matters "also reflects 'practical considerations' relating to this Court's capacity to decide issues," as "[r]equiring parties to raise issues below not only avoids unnecessary adjudication in this Court," but also promotes "the creation of an adequate factual and legal record." *Id., at* 90-91.

Court because Due Process and Equal Protection claims were timely raised in an *amicus* brief filed in the court below by the Nevada State Education Association (NSEA). This argument is unavailing because the court below, like this Court, is not required to and almost always refuses to consider issues not raised by a party.[19] And, indeed, the court below did not rule on any of the federal constitutional issues raised by the NSEA.

Petitioners may claim, in the alternative, that they should be relieved from Rule 14.1(g)(i)'s strictures because they were caught unawares by the lower court's initial ruling and, accordingly, their petition for rehearing provided the first reasonable opportunity for these issues to be raised by anyone. This Court should rebuff this excuse as well.

To be sure, in the last seventy years this Court has granted certiorari in two cases arising from state supreme courts even though the federal questions were not raised in those courts until rehearing. In *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980), this Court bent its usual rule because the lower court's initial ruling in each case was not only novel but could not reasonably have been anticipated and addressed in an earlier filing. Although Petitioners may assert that they fit within the *PruneYard-Richards* exception, because they, too, were totally surprised, that claim is not legally supportable.

First, the lower court's initial briefing Order of July 1 not only drew attention to "an apparent conflict" between the provisions of the State Constitution mandating *(a)* funding of the public schools, Art. 11, §6, *(b)* a balanced budget for the State overall, Art. 9, § 2, and *(c)* a two-thirds majority vote in both Houses of the Legislature for any tax increases to defray the costs of *(a)* and *(b)*, Art. 4, §18; that Order also specifically directed all interested parties to "address the dynamic tension created" by the different constitutional provisions and to

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[19] *See, e.g., Nevada Power Co. v. Haggerty*, 989 P.2d 870, 877 n.9 (Nev. 1999); *United Parcel Service, Inc. v. Mitchell*, 451 US 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960). This principle is especially honored in cases of first impression involving the interpretation of a statute or a constitutional provision. *Davis v. United States*, 512 U.S. 452, 457 n.3 (1994)(*per curiam*).

"identify and address all available means for resolving the impasse . . . ." Order Directing Answer (filed July 1, 2003), at 3. That Order should have alerted Petitioners that the lower court might again do what it – and this Court – have not infrequently done: reduce such "tension" in a particular case by giving primacy to one constitutional provision over another.[20]

Second, even if Petitioners missed the import of the lower court's command to "address the dynamic tension" that court had identified, other interested entities did not. Indeed, as noted above, the NSEA, whose *amicus* brief to the lower court was timely filed, and whose brief Petitioners studied with considerable care, *see, e.g.*, 56a, n.9, raised two of the principal federal constitutional issues that Petitioners present in their instant petition to this Court: asserting that "voter dilution" violated the Fourteenth Amendment's Due Process and Equal Protection Clauses.[21] Thus, although Petitioners may say that the federal issues that they have raised here, and which they

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[20] *See, e.g., Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991); *Shelton v. Lamb*, 460 P.2d 156, 157 (Nev. 1969); *Ex rel Shelor*, 111 P. 291, 293 (Nev. 1910); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971)(reconciling First Amendment's Free Exercise and Establishment Clauses); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)(same); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)(same); *Nebr. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)(reconciling First Amendment's Free Press Clause with Sixth Amendment's Fair Trial Clause); *Waller v. Georgia*, 467 U.S. 39, 45 (1984)(same).

[21] Significantly, although no other brief duplicated the NSEA's arguments, or the breadth of its scholarship on these and related federal constitutional issues, *see Amicus* Brief of the NSEA (filed July 7, 2003), at 3-5, 9-18, nearly every party and *amicus* – with the exception of Petitioners – appreciated the importance of federal constitutional provisions (and this Court's caselaw regarding those provisions), and so liberally larded their briefs with citations to same. *See, e.g.,* Answer and Opposition to Petition for Writ of Mandamus (filed July 3, 2003, by Care and Amodei), at 11; Answer and Opposition to Petition for Writ of Mandamus (filed July 7, 2003, by Respondent Nevada State Legislature), at 7, 9-11, 13, 22-23, 25, 28-29, 38, 40, 46-47, 49; *Amicus* Brief of Pacific Legal Foundation (filed July 7, 2003), at 2-3, 10-13, 15; *Amicus* Brief of the University of Nevada (filed July 7, 2003), at 2; *Amicus* Brief of the Clark County Ass'n of School Administrators (filed July 7, 2003), at 12-13; Supp. Brief of Petitioner Gov. Kenny C. Guinn (filed July 7, 2003), at 4, 7; Supp. Brief in Opposition to Governor's Petition and Counter-Petition for a Writ of Mandamus (filed July 7, 2003), at 5, 11, 13; *Amicus* Brief of Nevada Taxpayers Ass'n (filed July 7, 2003), at 2, 7, 15-16, 18.

first raised in their petition for rehearing, could not have been anticipated or addressed before the lower court's initial ruling, the NSEA brief belies that assertion.

Finally, although, as also noted above, the lower court was not obliged to entertain issues raised by *amici,* Petitioners could have adopted the NSEA's issues and arguments as their own. *See, e.g., United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56, 60 n.2 (1981); *United States v. Van Winrow,* 951 F.2d 1069, 1072 (9th Cir. 1991)(*per curiam*). Indeed, while Petitioners' counsel received a negative response from the lower court to their query as to whether it would "order" "a response" to the NSEA brief, counsel never inquired whether the lower court would *allow* either such a response or a second supplemental brief. 56a, n.9.

In sum, Petitioners rejected the lower court's invitation to raise whatever issues they thought appropriate, neglected to respond to the NSEA's filing, and failed to take advantage of an opportunity to timely adopt and present as their own the federal constitutional issues raised by the NSEA.

This Court has held that regardless of whether a critical omission, such as the failure to raise federal issues in the underlying proceedings, is the product of inexcusable ignorance or neglect or results from a deliberate decision to withhold credible arguments in order to gamble on winning outright while silently reserving a dispositive claim or hypothetically cert-worthy issue, *Engle v. Isaac,* 456 U.S. 107, 129 & n.34 (1982), Petitioners are not permitted to profit such tactics or from their counsel's mistakes. *See Granberry v. Greer,* 481 U.S. 129, 131-32 (1987); *Wainwright v. Sykes,* 433 U.S. 72, 89-90 (1977). In the final analysis, Petitioners' failures undercut any claim of shock and surprise and defeat any attempt to have this Court grant their petition.

III. PETITIONERS' CLAIMS LACK MERIT AND RAISE A NON-JUSTICIABLE POLITICAL QUESTION

Even assuming, *arguendo,* that neither mootness nor Petitioners' failure to raise below the federal questions they now present bar this Court from assuming jurisdiction, Petitioners' arguments on those questions lack merit.

A. Petitioners' Republican Guarantee Clause Claim Presents a Non-Justiciable Political Question

Under Petitioners' theory, any alleged or purported error in constitutional construction of a state constitution by a state court of last resort violates the Republican Guarantee Clause and renders that court's decision eligible for review and reversal by this Court. Pet. at 11-14. Accepting that theory would not only open the floodgates to every litigant disappointed by the result of a state constitutional law decision, it would change fundamental premises that this Court has held sacred for more than 200 years, that "this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void," that State courts "are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void," and that state courts are the final arbiter of their own laws and constitutions. *Calder v. Bull*, 3 U.S. (Dall.) 386, 392-93 (1798)(per Chase, J.). Resultantly, "[a] judgment by the highest Court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 613 (1937)(Cardozo, J.).[22]

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[22] *See also Nesmith v. Sheldon*, 48 U.S. 812, 818 (1849)("it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own constitution . . . , when that construction has been settled by the decision of its highest judicial tribunal."); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 155 (1896)("there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."); *Williams v. Eggleston*, 170 U.S. 304, 310 (1898) (" this court cannot hold that the state court was mistaken in its construction of the state constitution"); *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979)("this Court must accept whatever construction of a state constitution is placed upon it by the highest court of the State.") *Cf. Johnson v.* Frankel, 520 U.S. 911, 916 (1997); *Arizona v. Evans*, 514 U.S. 1, 9 (1995); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Exxon Corp. v. Dept. of Revenue of Wis.*, 447 U.S. 207, 226 n. 9 (1980); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). "This proposition, fundamental to our system of federalism, is applicable to procedural" constitutional "rules as well as substantive rules." *Johnson*, 520 U.S., at 516, citing *Wardius v. Oregon*, 412 U.S. 470, 477 (1973).

In fact, this Court has repeatedly recognized that "'it is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" *Michigan v. Long, supra,* 463 U.S., at 1040, quoting *Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940). Any other view, particularly the one advanced by Petitioners here, would require this Court to undertake supervisory control over a state supreme court anytime such a court frustrates a litigant by construing its own constitution in a fashion contrary to one that this Court might prefer if standing in the state court's shoes.

Petitioners' proposal has alarming implications. Transforming this Court into a court of error to review alleged misinterpretations of state constitutions would not only threaten to overwhelm this Court's docket, but inevitably would upset the fundamental balance put in motion when the Federal Constitution was promulgated. This Court has consistently adhered to a respect for the independence and authority of state courts, and has left undisturbed decisions that might otherwise be viewed as unwise or even extreme. For these reasons, this Court has consistently rejected entreaties to use the Guarantee Clause as a fulcrum to pry away authority from state courts or state political systems. [23]

This Court has emphasized that a dominant consideration in assessing whether an issue is justiciable (or inherently political and non-justiciable) is whether there are "satisfactory criteria for a judicial determination." *Coleman v. Miller,* 307 U.S. 433, 454-55 (1937). Thus, in *Baker v. Carr,* this Court examined the Guarantee Clause in detail and concluded that the lack of standards to guide judicial discretion rendered decisions on claims under the Clause as involving "those elements which define a 'political question,' and for that reason and no other, they are non-justiciable." 369 U.S. 186, 218 (1962). Similarly

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[23] *See, e.g., Taylor v. Beckham (No. 1),* 178 U.S. 548 (1900)(Guarantee Clause claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held non-justiciable); *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849)(Guarantee Clause claim that popular assembly's proclamation of new government nullified martial law decree of charter government held non-justiciable; this Court refused to decide which one of the two existing governments was legitimate).

here, there are no standards to guide this Court, as this Court has never developed any such standards and as Petitioners have not suggested any of their own. Any dispute that may reoccur properly belongs in the political system.

The appropriateness of a political resolution of this controversy, as opposed to a judicial one, becomes even clearer when one examines Petitioners' other claims. The authority that Petitioners would have this Court exercise—ultimate interpretational control over a State Constitution and mandatory review of "voter dilution" claims whenever legislative procedural devices might limit legislators' participation in ultimate decisions—would constitute an unnecessary and improper interference with the business of state legislatures and the rulings of their parliamentary officers.

In addition, because Petitioners' claims sound in Equal Protection and Due Process, any endorsement by this Court of those process-based claims would readily lead to petitions to have this Court oversee the internal affairs of Congress, as the partisan contentiousness in that body often results in procedural gambits that benefit one or another side in a dispute. Unless this Court wishes to become continually ensnarled in that never-ending political thicket, it should not abandon its traditional view that these issues are properly and exclusively committed to political resolution.[24]

Indeed, any other result would be a significant expansion of this Court's jurisdiction and would constitute an unlimited license to interfere with the sovereignty of the States. There is no reason for this Court to begin down a road so clearly and so wisely rejected by the Framers of our Constitution. For these reasons, intervention by this Court is as unwise as it is unwarranted.

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[24] Historically, Guarantee Clause issues were enforced at the federal level by congressional action. For example, when States of the Confederacy were readmitted into the Union following the Civil War, all questions regarding the compliance of their constitutions with Guarantee Clause considerations fell to and were resolved by Congress, and by Congress alone. *See generally,* William M. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 11-77 (1972). Petitioners have provided no reason for this Court to depart from that historic approach.

B. Petitioners' Due Process Claims Are Hollow

Petitioners assert that the Fourteenth Amendment's Due Process and Equal Protection Clauses are violated whenever a state's highest court allegedly strays from its own canons of constitutional interpretation or when a state legislature supposedly departs from its own procedures. Pet. at 16-22, citing *Conway v. Searles*, 954 F. Supp. 756 (D. Vt. 1997), and *Rea v. Matteucci*, 121 F.3d 483 (9th Cir. 1997). Petitioners make too much of those cases, however, as in each one the state legislature had enacted laws that affected vested property rights of the plaintiffs, yielding claims quite different than the ones asserted here.

In fact, the broad proposition asserted by Petitioners would mean that the Fourteenth Amendment's Due Process and Equal Protection guarantees operate to invalidate the well-established "enrolled bill rule," under which an act passed by a legislature, executed by the proper legislative officers, signed by a governor, and filed in the appropriate office not only constitutes conclusive evidence of the passage of the act as enrolled but also immunizes that act from attack on the basis of imagined or even real procedural irregularities.

The "enrolled bill rule" has been a longtime feature of both this Court's jurisprudence, *see, e.g., Field v. Clark*, 143 U.S. 649 (1892), and Nevada caselaw. *See, e.g., State v. Beck*, 56 P. 1008, 1010 (1899). Significantly, neither this Court nor any other has recognized or even suggested federal constitutional limitations on the "enrolled bill rule" like those proposed by Petitioners.

The reason why no court has imposed such limitations lies in the widespread appreciation that that rule reflects constitutional understandings rooted in the separation of powers, as well as the importance of allowing the legislature to police its own processes without undue intrusions by other branches. *See, e.g., Greenberg v. Bolger*, 497 F. Supp. 756, 773 (E.D.N.Y. 1980). A departure from the rule would also create a new exception to this Court's holding that "the legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

Due Process claims remain available, of course, when the legislative action is "wholly arbitrary or irrational." *Id., at* 433. But that type of arbitrariness or irrationality is not, however, the gravamen of Petitioners' complaint. Instead, Petitioners speculate about a future injury in a future case, one in which their votes might be accorded less than a heightened or enlarged impact (greater than a "one person, one vote" effect), and thus argue that this could conceivably constitute the type of intentional discrimination that actual voter dilution claims must prove. Their argument requires conjectures to be pyramided upon suppositions, without the necessary specific proofs. This Court should not countenance it.

C. Petitioners' Voter Dilution Claims Are Unsupported by Anything in the Record of this Case

Petitioners' voter dilution claims are equally lacking in merit. To meet the requirements of a voter dilution claim under the Fourteenth Amendment, Petitioners were required "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). Petitioners offered no such proof on either prong of the *Davis* test.

First, Petitioners have not and cannot show that they are members of an "identifiable political group." Although 23 of the 24 Petitioners voted against all of the tax bills at issue in this case, there is nothing in Petitioners' composition or status as a "group" that indicates that they are committed to voting as a bloc against all taxes or that they will be in a position, as elected representatives, to do so in the future. (While all of the Petitioners are Republicans, so are more than half the members of the Nevada Legislature, as are a third of the Respondents, including both the Governor and Lieutenant Governor).

Second, Petitioners have not and cannot demonstrate that the Nevada Supreme Court's ruling that would have permitted approval of a tax bill by a simple majority vote in both houses was motivated by an intent to discriminate or that Nevada's elected officials (including the members of that court, the leaders of the Legislature, or the Governor and Lieutenant Governor) intend to discriminate against them in the future.

Moreover, merely pointing to a disagreeable result, which is all Petitioners have done, is no evidence of improper motive.[25]

Finally, Petitioners' reliance on *Coleman v. Miller*, 307 U.S. 433 (1939), to support their voter dilution claims is misplaced. In *Coleman*, state legislators opposed to a proposed federal constitutional amendment challenged the right of the lieutenant governor to cast the decisive ratifying vote. This Court found that it had jurisdiction solely because the federal amendment process was at issue. Because the state legislative action was part of a federal constitutional process and not solely internal to the state, that legislative action was within this Court's cognizance. Indeed, the *Coleman* Court provided a blueprint as to why the Court should not entertain this matter: "*Had the questions been solely state questions, the matter would have ended there.* But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court." *Id.*, at 437-38 (emphasis added; citations omitted).

Here, however, the questions "arose under" the Nevada Constitution, not the Federal Constitution, and were not raised before, entertained by, or ruled on by the court below. There is no province to do so now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[25] This Court has recognized that no presumption of intentional discrimination can attach to the actions of elected officials (both legislators and supreme court justices are elected officials in Nevada). *See Davis, supra,* 478 U.S., at132 ("without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group.").

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No. 03-1037

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.* MEMBERS OF THE NEVADA STATE ASSEMBLY AND NEVADA STATE SENATE, *et al.*

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Governor Guinn, the lead respondent here and petitioner below, has not opposed the petition for a writ of certiorari; indeed, he has previously disavowed the ruling below in the parallel federal court action. At the very least, then, this Court should call for a response from the lead respondent whose own petition for a writ of mandamus triggered the unlawful remedy he now disavows.

But the Legislature—or, more precisely, the Legislative Counsel, as we are aware of no act of the Legislature authorizing the filing of its brief—has weighed in to *oppose* this Court's review of a decision rendered *against* it. It makes every argument in the book to *defend* the adverse decision and also to prevent this Court from even considering that extraordinary order.

If anything, the Legislature's insistence on defending a judgment that was adverse to it, but which freed it from a concededly constitutional restriction on its own ability to raise taxes, should highlight the necessity of this Court's review.

I. This Case Is Not Moot or, Alternatively, Easily Falls Within Well-Established Exceptions to Mootness

A. The State Assembly Already Twice Violated the 2/3 Vote Provision of the Nevada Constitution.

As Petitioners have previously noted, the Nevada Assembly already deemed as "passed" two bills—SB5 and SB6—increasing taxes without the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution. The vote-dilution harm to Petitioners caused by that constitutional violation has already occurred and continues as long as the decision "authorizing" such conduct remains on the books.

The Legislature makes three points in opposition. First, it contends that because SB5 and SB6 never became law, there was no unconstitutional action by *the Legislature* as a whole. Opp. 12. Second, and somewhat relatedly, it contends in a

footnote that because different versions of SB6 were approved by the Senate and the Assembly, the bill "*could* have been referred to a conference committee" and a new compromise bill "*could* have then been approved in both houses by a two-thirds vote." Opp. 7 n.6 (emphasis added). Finally, and perhaps most extraordinarily, the Legislature contends in another footnote that the Assembly's approval of SB5 without a 2/3 vote did not violate the Nevada Constitution because it "did not have the effect of increasing the overall revenue to be raised by SB6," which had already been deemed "passed" without a 2/3 vote. Opp. 9 n.7.

While intriguing, none of these contentions is correct, nor sufficient to render this case moot. The 2/3 vote requirement applies to "*each house*" of the Legislature, not just the Legislature as a whole, and it applies to "*all bills*," not just "bills" that become "law." *See also* Art. 4 § 16 ("Any *bill* may originate in either House of the Legislature") (emphasis added); *compare id.*, Art. 4 §§ 17, 23 ("Each *law* enacted by the Legislature shall embrace but one subject"; and "no *law* shall be enacted except by *bill*") (emphasis added). In other words, the constitutional vote requirements apply to *bills* at each stage of the legislative process, not just to the *law* finally approved at the end of the process. Not surprisingly, the Legislature cites no authority for its astounding proposition, and its own treatment in footnote 7 of SB6—passed without a 2/3 vote—as setting a new tax baseline to legitimize the Assembly's passage of SB5 without a 2/3 vote contradicts its own contention. Indeed, if SB6, a mere "bill," is sufficient to set a new tax baseline, then it was sufficient to trigger the constitutional 2/3 vote requirement, and retains sufficient vitality to prevent mootness.

B. "Voluntary Cessation" Analysis Is Appropriate Where, as Here, the Legislature Fights To Uphold the Nevada Court's Decision "Authorizing" Unconstitutional Conduct.

Even if one of the Legislature's tortured theories were sufficient to nullify the Assembly's votes on SB5 and SB6 and thereby trigger potential mootness, two well-established exceptions to mootness would permit this Court's review. First, as Petitioners previously noted, voluntary cessation of unlawful conduct by a defendant will moot a case only if there is *no reasonable chance* that the defendant will resume its unlawful conduct. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.4, at 140 (4th ed. 2003).

The Legislature tries to avoid this substantial hurdle by contending that it does not apply to governmental actors. Opp. 14-15 (citing *Fed'n of Adver. Indus. Rep's, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003); *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990); *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 677 (1993) (O'Connor, J., dissenting)). But this Court has never embraced such a lax "voluntary cessation" standard for governmental actors as the Legislature proposes. In *Preiser v. Newkirk*, 422 U.S. 395, 402-03 (1975), for example, cited by the Legislature, this Court expressly noted that the case involved "more than a '[m]ere voluntary cessation of allegedly illegal conduct,'...where we would leave '[t]he defendant ... free to return to his old ways.'" Instead, this Court found that "there is now 'no reasonable expectation that the wrong will be repeated.'" *Id.* (citing *W. T. Grant Co.*). And *W. T. Grant*, in which the voluntary cessation exception to mootness was first articulated, was itself a case involving cessation by governmental actors.

Moreover, even if this Court were now to accept the deferential position taken by the 6th and 7th Circuits and suggested by Justice O'Connor's dissenting statement in the *Jacksonville* case, the Legislature is not entitled to such deference where, as here, it has not repudiated its unconstitutional actions but has instead steadfastly maintained that its actions were perfectly constitutional because sanctioned by

the decision below, and where it has vigorously fought to protect that decision. By going to such lengths to maintain on the books a decision that gives it continuing authority to ignore a structural impediment imposed on it by the people of Nevada, the Legislature has itself demonstrated that its "voluntary cessation" is not genuine. Indeed, the continuing vitality of the decision below casts just the kind of "continuing and brooding presence" over Petitioners that concerned this Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).[1]

This case thus involves more than mere speculation about the Legislature's future intent. Indeed, plans are already underway to impose new education-linked taxes. *See* Ray Hagar, "Some School Districts Struggle with Overload," Reno Gazette-Journal A8, 2004 WL 57372782 (Feb. 1, 2004) ("School trustees also said they are considering a bill-draft request for the Nevada Legislature to establish new tax sources to help fund school construction"). Negotiations over those taxes will continue to be effected by the Nevada court's ruling unless this Court grants review.

C. This Is a Classic Case of the "Capable of Repetition Yet Evading Review" Exception to Mootness.

The Legislature's contention that this case does not satisfy either prong of this well-established exception to mootness is simply misplaced, as Petitioners easily satisfy both prongs of the exception.

The Legislature first asserts that Petitioners "have not introduced any evidence demonstrating the 'reasonable likelihood' that the same putative misconduct will recur." Opp. 18. That standard, or the "reasonable expectation" standard

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[1] The Legislature also cites a string of cases for the uncontestable proposition that the *repeal* of a statute renders a case moot. *See* Opp. 15 n. 12. Those cases are inapposite, as the Legislature never took any action to rescind the unlawful votes on SB5 and SB6, and the decision "authorizing" the unlawful votes is still on the books, as governing precedent.

actually articulated in *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998), is easily satisfied here. The Legislature's own actions demonstrate that it is bent on preserving the Nevada Supreme Court's "authorization" for it to ignore the 2/3 provision. Because those actions only make sense if the Legislature hopes to rely on that decision in the future, there is evidence enough to support Petitioners' contention that the unconstitutional conduct by the Legislature is reasonably likely to recur—or at the very least that Petitioners' expectation of a repeat performance by the Legislature is not unreasonable.

There has never been an evidentiary hearing in this case, so the Legislature's apparent insistence on direct "evidence" is a bit disingenuous, but the indirect evidence already offered by Petitioners is also more than adequate to demonstrate a reasonable likelihood or expectation of recurrence. As Petitioners noted in their opening brief, the Governor's *amici* below touted the fact that the stand-off between the forces for increased government spending and those opposed to increased taxes is "likely to recur" each legislative session, and Senator Dina Tutus—one of the Respondents represented in the Legislature's brief—has specifically noted that future taxes will "always be tied to the [education funding bill] because of" the ruling below. *See* Pet. 27.

Second, the Legislature contends that Petitioners have not introduced any evidence demonstrating that *they* are reasonably likely even to hold office for the next legislative session, much less oppose a tax measure or constitute greater than a one-third block of votes. Not surprisingly, the Legislature cites no authority for the added burden they would impose on Petitioners, and this Court's holdings in the arena of litigation by legislators are to the contrary. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (considering election law challenge under "capable of repetition" mootness exception where candidates *might* again seek access to the ballot); *see also* CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.3, at 133.

Moreover, even if the standard was as the Legislature claims, Petitioners clearly meet it. All 24 Petitioners have recently filed campaign finance disclosure reports indicating that they are already raising funds for next fall's primary and general elections.[2] Although not definitive yet—Nevada's filing period does not open until May 3, Nev. Rev. Stat. § 293.177—the mere fact that re-election committees have been formed and are raising money, combined with the fact that in Nevada (as elsewhere) incumbents are "statistically almost sure winners,"[3] is more than sufficient to demonstrate a reasonable likelihood or expectation that at least some of these legislators will hold office when the Legislature reconvenes next year.

Nor do these Petitioners need to prove that they will be sufficient in number during the next legislative session to block new tax measures, although given voter anger over the last tax increase—anger that has already launched a referendum drive to repeal the tax—there is certainly a "reasonable expectation" that these legislators, who opposed the tax increase, will be re-elected.[4] The dilution of their votes is alone sufficient to state a claim; the effect that vote dilution has already had on legislative negotiations is not just capable of repetition, but is in fact a continuing injury whenever the leg-

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[2] The primary and general elections for state legislative offices in Nevada are September 7 and November 2, 2004, respectively. N.R.S. §§ 293.175, 293.12755. Most of Petitioners' most recent campaign finance reports are available on-line at http://sos.state.nv.us/contributions.asp (last visited March 1, 2004).

[3] Rod Smith, "Gaming Contributions: Political Gamble," The Las Vegas Review-Journal 1D, 2003 WL 4734475 (Feb. 9, 2003).

[4] *See, e.g.*, Cy Ryan, "Ralliers Plan to Speak Against Tax Foes," Las Vegas Sun 1, 2003 WL 62391597 (Oct. 31, 2003) (describing referendum and its basis in public anger "at the Legislature for approving the taxes"); Ed Vogel, "GOP has high election hopes," The Las Vegas Review-Journal 1B, 2004 WL 61418357 (Jan. 12, 2004); Editorial, Reno Gazette-Journal 9 (Oct. 3, 2003) ("It is widely expected that Nevada voters will retaliate at the ballot box against those who voted for new taxes").

islature is in session, as long as the decision below remains on the books, "authorizing" unconstitutional conduct by the Legislature. *See* Pet. App. 27a (noting the Legislature's admission below that the court's ruling effected legislative negotiations); *cf. Super Tire Eng. Co. v. McConkle*, 416 U.S. 115, 126-27 (1974) (holding that a challenge to a state law providing welfare benefits to striking workers was not moot once the strike ended because a court decision could substantially affect future labor-management relations); *see also* CHEMERINSKY, FEDERAL JURISDICTION, § 2.5.2, at 131 (citing *Super Tire* as "particularly instructive").

The Legislature's contentions with respect to the evading review prong are also misplaced. By constitutional command (assuming that still means anything in Nevada), the Nevada legislature can meet only 120 days every other year. As Respondent Arberry noted in a separate brief he filed below, "budgetary bills are typically among the last bills to be enacted in most legislative sessions," "in the last week of the legislative session," would then quickly be enrolled and thus would, according to the Legislature, evade rule under the enrolled bill doctrine. Thus, not only would any controversy over new tax bills be "too short" in duration for adequate judicial review, it would be well short of the nine-month gestation period that led this Court in *Roe v. Wade* to find that abortion cases evaded review. *See* Opp. 19 n.17.

II. The Federal Questions Were Adequately and Timely Presented Below.

Inexplicably, the Legislature contends that Petitioners did not comply with this Court's Rule 14.1(g)(i). Yet Petitioners expressly stated that they "specifically raised the federal vote dilution, vote nullification, due process and Republican Guarantee Clause claims" in a petition for rehearing filed with the Nevada Supreme Court on July 21, 2003, and they included the entire petition for rehearing in their appendix, with specific reference to the pages at which the federal claims were raised. *See* Pet. 8 (citing Pet. App. 66a-73a).

Even if the Legislature meant only that Petitioners had not identified the way in which the Nevada Supreme Court "passed on" the federal questions presented, that contention is also erroneous. *See* Pet. 9 (noting that the Nevada Supreme Court "refus[ed] even to address, much less put to rest, Petitioners' significant federal claims").

If the Legislature instead meant only that the federal questions were not *properly* raised because asserted only in a petition for rehearing, Petitioners addressed this point as well. *See* Pet. 9 ("this Court has jurisdiction where, as here, the federal issues arose as the result of an unexpected decision by a state's highest court and petitioners therefore had no prior opportunity to raise the federal claims") (citing *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930)). In circumstances such as those presented here, the federal issues are timely raised, and will support the exercise of jurisdiction by this Court, *even if* the petition for rehearing is summarily denied without mention of the federal claims. *See Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932). Indeed, in the parallel federal action, the Legislature has contended that the *Rooker-Feldman* doctrine bars consideration of Petitioners' federal claims precisely because Petitioners' "presented their federal claims to the Nevada Supreme Court when they asked the court to reconsider its *Guinn* decision." Legislature Ans. Br. at 23, *Angle v. Legislature*, No. 03-16326 (9th Cir.).

Finally, the Legislature mischaracterizes the "apparent conflict" identified in the Nevada Supreme Court's July 1, 2003 order that supposedly should have led Petitioners to anticipate the extraordinary ruling below. That Order only made mention of the "apparent conflict between two provisions of the Nevada Constitution": Art. 4, § 18(1)'s provision that appropriations be passed by a simple majority, and Art. 4, § 18(2)'s provision requiring a 2/3 vote for tax increases. Order at 1. These are the "aforementioned provisions" whose apparent conflict the parties were directed to brief, not any

supposed conflict between Art. 4, § 18(2) and the education funding provision of Art. 11, § 6 on which the Nevada Court's ruling was based. And the Order itself directed the parties to identify "all available means" for resolving the impasse "so that the Legislature may fulfill its constitutional obligations." Nowhere in the Order, or in the Chief Justice's bench statement earlier that same day, is there even a suggestion that the court was considering the extraordinary remedy of directing the Legislature to ignore Art. 4, § 18(2).

Indeed, Governor Guinn, the petitioner below, repeatedly noted in the parallel federal action that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." Mot. to Dismiss 6, *Angle v. Legislature*, No. CV-N-03-0371 (D. Nev. 2003); *id.* at 9 (the Nevada Supreme Court "*independently* determined a conflict existed," that the 2/3 provision "must 'give way,'" and that "This determination was beyond any relief" sought).[5]

III. Whether a State Court's Blatant Disregard of Its Own Constitution Should Result in Justiciable Federal Claims Should Be Addressed by this Court.

The Legislature conjures a parade of horribles should Petitioners' Republican Guarantee or Due Process and Equal Protection claims be allowed to stand, but as the Pacific Legal Foundation *amicus* brief adequately demonstrates, there is no prospect that this will apply to routine constitutional interpretation cases rather than be reserved to extraordinary abuses of judicial power such as occurred here. Leaving state courts "free and unfettered" to interpret their own state con-

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[5] Nor does the fact that the NSEA *amici* suggested below that the 2/3 vote provision was unconstitutional constitute sufficient notice that the Nevada Court was going to order the Legislature to ignore the provision *despite* its constitutionality. The Nevada Court "almost always refuses to consider issues not raised by a party." Opp. 22.

stitutions and laws does not require that this Court turn a blind eye to willful disregard of those constitutions and laws. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Nor does this case involve a political question of the sort that this Court declined to consider in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) and its progeny, as the *amicus* brief filed by the National Taxpayers Union, *et al*, amply demonstrates. Indeed, it is more than a little ironic to see the Legislature touting the "appropriateness of a political resolution of [its budget] controversy, as opposed to a judicial one," in a brief *defending* the state court's intrusion into that very political process.

The Legislature's reliance on the "enrolled bill rule," Opp. 28, to discount Petitioners' Due Process claims is not only unavailing but actually bolsters Petitioners' "evading review" contention. If, as the Legislature contends, final enrollment of a bill after passage "immunizes that act from attack on the basis of imagined or even real procedural irregularities," it is even more critical for this Court to address the Due Process violations now, before the real procedural irregularities already committed are repeated and then insulated from attack.

Finally, the Legislature mistakenly reads *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). *Davis* specifically recognized that vote dilution claims are justiciable even when "the characteristics of the complaining group are not immutable." *Id.* at 125. Moreover, *Davis* was a reapportionment case, so is inapposite. In *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986), decided the same year, this Court expressly suggested that a state official deprived of the effectiveness of his vote as determined by *state law* would have a vote dilution claim.

CONCLUSION

For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

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No. 03-1037

IN THE
Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*, Members of the Nevada State Assembly and Nevada State Senate,
Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEVADA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL TAXPAYERS UNION, THE NEVADA MANUFACTURERS ASSOCIATION, THE HOWARD JARVIS TAXPAYERS FOUNDATION, AMERICANS FOR LIMITED GOVERNMENT, AMERICANS FOR TAX REFORM, THE CLUB FOR GROWTH, NEVADA CORPORATE HEADQUARTERS, INC., THE NEVADA MOTOR TRANSPORT ASSOCIATION, THE NEVADA TAXPAYERS ASSOCIATION, THE RETAIL ASSOCIATION OF NEVADA, AND THE RENO-SPARKS CHAMBER OF COMMERCE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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February 20, 2004

No. 03-1037

IN THE

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HON. SHARRON E. ANGLE, *et al.*, Members of the Nevada State Assembly and Nevada State Senate,

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE[1]

The National Taxpayers Union, the Nevada Manufacturers Association, the Howard Jarvis Taxpayers Foundation, Americans for Limited Government, Americans for Tax Reform, the Club for Growth, Nevada Corporate Headquarters, Inc., the Nevada Motor Transport Association, the Nevada Taxpayers Association, the Retail Association of Nevada, and the Reno-Sparks Chamber of Commerce respectfully move, pursuant to Rule 37.2(b) of this Court, for leave to file a brief

[1] With the exception of Nevada Corporate Headquarters, Inc. ("NCH"), none of the parties submitting this brief has a parent corporation, and no publicly held company owns 10 percent or more of any party. NCH is a wholly-owned subsidiary of Superior Capital Corporation, a Nevada limited partnership. Neither it nor its parent company issues shares to the public.

as amici curiae in support of petitioners. Counsel for petitioners has granted consent to file this brief. Counsel for respondents have not granted consent.

The foregoing groups represent taxpayers and businesses whose interests are put in jeopardy by the decision of the Supreme Court of Nevada in this case. When public officials transgress the structural limits on their authority, particularly with respect to taxation and appropriation, they undermine the concept of a "Republican Form of Government" guaranteed by Article IV, § 4, of the Constitution. Such transgressions threaten the economic and political interests of people who care deeply about, and are seriously affected by, the way government collects and spends money.

The interests of the groups making this motion fall into two distinct areas. The first is protection of taxpayers from governmental indifference or hostility to their interests, often attributable to rent-seeking behavior involving political factions and public officials. The second is protection of vulnerable political constituencies from onerous, targeted taxes that are rendered more feasible by the abandonment of super-majority requirements. These groups note with dismay the cavalier decision of the Supreme Court of Nevada to disregard an important structural restraint put in place by the voters of Nevada to prevent the adoption of new taxes without the support of a super-majority of the legislature.

The National Taxpayers Union is considered the nation's oldest organization representing individual taxpayers. One of its key goals is adoption of constitutional limitations on the power of government at all levels to impose taxes and incur debt. A non-profit, civic organization founded in 1969, it represents over 350,000 members in all 50 states. Its members played important roles in the passage of the Nevada measure

and similar limitations in other states, and it submitted briefs amicus curiae to this Court in support of the petitions in *Missouri v. Jenkins*, 515 U.S. 70 (1995), and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, West Virginia*, 488 U.S. 336 (1989), both of which this Court accepted for review.

The Nevada Manufacturers Association ("NMA") is a non-profit corporation organized under the laws of Nevada. Its mission is to protect and support the manufacturing companies in Nevada. NMA has close to 400 members, with membership varying from the largest manufacturing company in Nevada to some with one or two employees. NMA was the lead signatory to a brief amicus curiae submitted to the Supreme Court of Nevada in the instant litigation.

The Howard Jarvis Taxpayers Foundation ("HJTF") is a non-profit charitable foundation devoted to economic education, the study of tax policy, and defending the interests of taxpayers in the courts. In support of its activities, HJTF has also sponsored numerous studies and fora on the subject of taxation and public spending.

Americans for Limited Government ("ALG") is a non-profit civic organization that advocates policies on the state and federal level that seek to reduce governmental spending and regulation. ALG also supports efforts to increase judicial accountability and reinstatement of the Tenth Amendment's policy of enumerated powers. ALG opposed the tax increase referendum in Alabama in 2003 and the referenda in Oregon in January 2003 and February 2004.

Americans for Tax Reform is a non-profit organization that serves as a national clearinghouse for the grassroots taxpayers'

movement by working with approximately 800 groups at the state and county level.

The Club for Growth is a nationwide political membership organization dedicated to advancing public policies that promote economic growth. It represents over 15,000 members in all 50 states.

Nevada Corporate Headquarters, Inc., is a wholly-owned subsidiary of Superior Capital Corporation, a Nevada limited partnership. It participated as amicus curiae in the proceedings in the Supreme Court of Nevada below.

The Nevada Motor Transport Association is a nonprofit association devoted to promoting the interests of the motor carrier industry. It currently has 317 members.

The Nevada Taxpayers Association ("NTA") is a non-partisan, non-profit membership association serving the citizens of Nevada since 1922 by advocating for responsible government at a reasonable price. NTA provides research on fiscal issues to policy makers and the public, and has been recognized by the Legislature of Nevada and by Governors of the State for its unbiased research. NTA has approximately 800 members statewide, including individuals, businesses of all sizes and forms of organization, and public agencies at both the state and local level. NTA has submitted briefs amicus curiae in a variety of cases involving taxation and the imposition of fees, including the instant litigation.

The Retail Association of Nevada advocates for many of the major retailers and a large portion of the small retailers in the state on issues involving state and local government. It has 700 members within the state. One of its main goals is to keep

Nevada a business friendly state. It has taken part in previous litigation involving a proposed tax on business income.

The Reno-Sparks Chamber of Commerce ("RSCC") is a non-profit organization that represents the regional and business community in the Reno/Sparks/Tahoe area. It has 2,100 members.

No party would suffer undue prejudice were the Court to accept this brief for filing.

Respectfully submitted,

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February 20, 2004

QUESTIONS PRESENTED

1. Whether a state supreme court's abrogation of a structural constitutional rule governing the enactment of legislation, pursuant to a rationale that would just as readily call for the abrogation of any similar rule, violates the Guarantee Clause of the federal Constitution.

2. Whether a state supreme court's abrogation of a structural constitutional rule governing the levying of taxes violates the Guarantee Clause of the federal Constitution by essentially transferring the power of the purse to the judiciary.

3. Whether, in circumstances where a state supreme court has definitively abrogated a key structural provision of a state Constitution, no other branch of the federal government has spoken to the issue, and a judicial remedy is clearly available, this Court should resolve a case arising under the Guarantee Clause on the merits.

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STATEMENT OF INTEREST[1]

As explained in the foregoing motion for leave to file a brief as amici curiae, the groups submitting this brief have a direct and substantial interest in this case. Separation of powers and the various structural restraints on public officials established by our constitutional system — including such restraints as super-majority requirements for new taxes — are the most effective defense against arbitrary government and selective, adverse legislation. When government ignores these restraints, or indeed is ordered to do so by the very judiciary that is supposed to enforce such restraints, taxpayers, businesses, and the citizenry as a whole are vulnerable.

The various groups submitting this brief have been active, and indeed have often taken the forefront, in protecting the interests of taxpayers and merchants in the political and legal arena. They have promoted a variety of provisions along the lines of the super-majority rule at issue in this case, and they have participated as amici in a range of litigation implicating the rights of taxpayers and the commercial sector. In fact, the Nevada Manufacturers Association, the Nevada Taxpayers Association, the Retail Association of Nevada, Nevada Corporate Headquarters, Inc., and the Nevada Motor Transport Association all participated as amici below, and two of the amici, the Nevada Manufacturers Association and the Retail Association of Nevada, were parties in the parallel federal action, *Angle v. Legislature of Nevada*, 274 F.Supp.2d 1152 (D. Nev. 2003).

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[1] No counsel for a party wrote this brief in whole or in part, nor did any person or entity, other than amici, their affiliates, or their counsel, make a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Nevada at issue in this petition derogates radically from the principle of government by consent. In ordering Nevada's legislators to disregard an important constitutional and structural restraint on the adoption of new taxes, specifically, the requirement of a two-thirds majority in each house to pass any such measure, the Supreme Court of Nevada rendered every such restraint vulnerable to judicial override. Not only does this leave economic and political minorities vulnerable to targeted taxes, but it also fundamentally deviates from the concept of a "Republican Form of Government" guaranteed by Article IV, § 4, of the federal Constitution. Although this Court has tended to avoid deciding cases on the basis of the Guarantee Clause, nothing in the nature of this clause necessitates its desuetude, and the instant case is apt for its reinvigoration.

In addition, the decision of the Supreme Court of Nevada undermines separation of powers to such a profound degree that it violates the Guarantee Clause. In issuing a writ of mandamus against the state's legislators, and in ordering them to appropriate funds and raise taxes without regard to constitutional restraints to which they are subject, the Supreme Court of Nevada essentially re-allocated the power of the purse from the legislature to the judiciary. Although the states are generally free to divide power among the branches of government as they see fit, few if any concepts are more firmly grounded in the republican tradition than the idea that the legislature controls the purse strings.

Finally, there is nothing in the nature of the Guarantee Clause that renders it categorically unfit for judicial application. Although specific disputes arising under the clause may prove non-justiciable, the clause is nevertheless susceptible of judicial application in the proper circumstances. As Justice Brennan observed in his opinion for this Court in *Baker v. Carr*, 369 U.S. 186, 210-11 (1962), "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." The instant case presents none of the indicia of non-justiciability identified by Justice Brennan in *Baker*. No provision of the Constitution vests responsibility to apply the Guarantee Clause solely in a branch of the federal government other than the courts; no other branch of the federal government has even purported to address the issues presented; and, because of the clear incompatibility of the Supreme Court of Nevada's decision with the principles of government by consent, this Court is fully capable of determining whether its decision can stand. *See Baker*, 369 U.S. at 217.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF NEVADA'S DECISION LEAVES ALL STRUCTURAL RESTRAINTS ON THE LAWMAKING PROCESS VULNERABLE TO JUDICIAL OVERRIDE.

Article IV, § 4, of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." Although this Court has been reluctant to apply the Guarantee Clause to cases presented to it for review, *see Baker v. Carr*, 369 U.S. 186, 209 (1962), nothing in the nature of the clause necessitates rendering it a dead letter so far as the judiciary is concerned. In fact, only twelve years ago, in *New York v. United States*, Justice O'Connor took note of continued support for reinvigoration of

the clause, and recognized such reinvigoration as presenting a "difficult" issue that awaits resolution. 505 U.S. 144, 185 (1992). Since then, a number of lower federal courts have contemplated the resolution of disputes arising under the Guarantee Clause on the merits, although none has actually predicated a decision on that ground. *See, e.g., Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Kelley v. United States*, 69 F.3d 1503, 1510-11 (10th Cir. 1995). Amici respectfully submit that no case would be more apt for reinvigoration of the Guarantee Clause than the instant one. Enforcement of the clause in such a clear and egregious example of derogation from the principles of a "Republican Form of Government" as this would prove salutary for the states and for the nation as a whole.[2]

The history of the founding era indicates quite strongly that one of the principal concerns underlying the Guarantee Clause was fear that a non-republican form of government, taking hold in one state, might cause other states to follow suit, and in time threaten the entire nation. *See, e.g.,* The Federalist No. 43 (James Madison). Although this may sound far-fetched to modern ears, it actually reflects great foresight. Not long after the Supreme Court of Nevada announced its decision in this case, public officials in California expressed an intention to seek similar relief from the courts of that state. *See, e.g.*, Evan Halper & Gregg Jones, *The State; Official to Sue Over Budget Impasse*, L.A. Times, July 17, 2003, at B6 ("A spokesman for Supt. Jack O'Connell said Wednesday that officials would use an argument similar to one that recently led the Nevada Supreme Court to grant Republican Gov. Kenny Guinn's request to intervene in that state's budget debate."). And the decision in Nevada may have ramifications in Arkansas as well.

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[2] For further analysis on this point, see Part III, *infra*.

See David Robinson, *Court To Appoint Special Master*, Fort Smith Times Record, Jan. 23, 2004, available at http://www.swtimes.com/archive/2004/January/23/news/special_master.html (discussing prolonged litigation over funding for schools in Arkansas) ("[The] Justices noted that in Nevada, to break an impasse on taxes to support education, the high court ordered that the Legislature there ignore a constitutional provision requiring a two-thirds vote and pass the taxes with a simple majority.").

It is true, of course, that the framers of the Guarantee Clause were most notably anxious about violent takeovers, as is evidenced by the other clauses in Article IV, § 4,[3] but they did not limit their attention to such possibilities. As commentator Arthur Bonfield noted in an article that this Court has cited, the goal of those who wrote and ratified the Guarantee Clause was to "prevent the creation by any means, *whether peaceful or otherwise*, of aristocratic, monarchial, or despotic state governments." Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 522 (1962). *See New York*, 505 U.S. at 183 (citing Bonfield).

The essence of republican government is government by consent. This consent has two distinct aspects — that public officials should be chosen by the people, and that these individuals, once in office, should be subject to the rule of law. *See Baker v. Carr*, 369 U.S. at 223 n.48 (quoting *In re Duncan*, 139 U.S. 449, 461 (1891)). Any gross deviation from these

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[3] This Section provides in full that: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, § 4.

principles implicates the Guarantee Clause. Although the decision of the Supreme Court of Nevada does not prevent the people of the state from choosing their leaders, it does derogate radically from the rule of law, and on this ground is properly subject to review under the clause. Specifically, the decision of the Supreme Court of Nevada eviscerates a structural restraint imposed by the people of Nevada on their legislature without a coherent rationale grounded in text or precedent.

Although a super-majority requirement for new taxes is quite common,[4] it is not a universal rule, and therefore cannot itself be considered part of the irreducible minimum of a republican form of government. But this Court must not mistake a specific application of the Supreme Court of Nevada's reasoning for the reasoning itself. If allowed to stand, that Court's decision would justify the overriding of any number of so-called "procedural" rules that regulate the lawmaking process, notwithstanding their relationship to the principle of government by consent.

The Supreme Court of Nevada did not make the point explicitly, but in arriving upon its decision it necessarily took the position that the appropriate remedy in a case such as this takes its cue from the circumstances presented. Thus, if a bare majority of the members of each house of the legislature were willing to approve new taxes, the so-called "procedural" rule requiring a two-thirds majority to adopt new taxes would have

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[4] The Constitutions of at least ten states require a super-majority vote in the legislature to levy new taxes. *See* Ariz. Const. art. IX, § 22 (two-thirds); Ark. Const. art. V, § 38 (three-fourths); Cal. Const. art. XIIIA, § 3 (two-thirds), Del. Const. art. VIII, § 10, cl. a (three-fifths); La. Const. art. VII, Pt. 1, § 2 (two-thirds); Miss. Const. art. IV, § 70 (three-fifths); Nev. Const. art. IV, § 18, cl. 2 (two-thirds); Okla. Const. art. V, § 33 (three-fourths); Or. Const. art. IV, § 25 (two-thirds); S.D. Const. art. XI, § 14 (two-thirds).

to give way. *See Guinn v. Legislature of Nevada*, 71 P.3d 1269, 1275, *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003). But, under the Supreme Court of Nevada's reasoning, what exactly would render this procedural rule uniquely vulnerable to override? What if two-thirds of the members of the Assembly were willing to adopt new taxes, but only one-third of the members of the Senate? By the Supreme Court of Nevada's logic, the state's requirement of bicameralism, *see* Nev. Const. art. IV, § 18, cl. 1, itself merely "procedural," would need to give way, notwithstanding this Court's recognition in *INS v. Chadha* that bicameralism is one of the most important structural safeguards in the lawmaking system. *See* 462 U.S. 919, 948 (1983) ("The bicameral requirement . . . was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent."); *id.* at 951 ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings."). *See also* 1 Montesquieu, *The Spirit of the Laws*, bk. XI, ch. VI, at 159 (1823) ("The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting.").

Similarly, what if two-thirds of the members of each chamber were willing to adopt new taxes, but the Governor were opposed? Why would Nevada's requirement of presentment, *see* Nev. Const. art. IV, § 35, survive analysis, whereas the merely "procedural" requirement of a super-majority would not? Indeed, none of the provisions of Nevada's Constitution that governs the lawmaking process would be immune from the Supreme Court of Nevada's protean standard. This approach may be consistent with abstract notions of equity, but it is radically inconsistent with the notion of government by consent and government by the rule of law. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 127-28 (1995) (Thomas,

J., concurring) ("If their remedial discretion had not been cabined, Blackstone warned, equity courts would have undermined the rule of law and produced arbitrary government."). For this reason, this Court should grant the writ and review the decision below.

II. THE SUPREME COURT OF NEVADA'S DECISION EFFECTS A RADICAL AND DANGEROUS RE-ALLOCATION OF POWER WITH RESPECT TO TAXATION AND APPROPRIATION.

As this Court has noted, nothing compels the states to separate powers among the three branches of government in precisely the same manner as these branches are separated at the federal level. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). Without doubt, states retain extraordinary power to re-allocate power within their constitutional systems. But surely this observation cannot be taken so far as to permit such wholesale re-allocation of power as would make a mockery of the concept of government by divided power. As this Court has observed, the concept of a "republican form of government" does have *some* content, with principle reference to the role of the legislature:

> By the Constitution, a republican form of government is guaranteed to every State of the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, *and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.*

Baker v. Carr, 369 U.S. at 223 n.48 (1962) (quoting *In re Duncan*, 139 U.S. 449, 461 (1891) (emphasis added)). *See also*

The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates.").

Among the prerogatives of the legislature, none is more firmly grounded in republican tradition than the power of the purse. Like the federal Constitution, the constitution of almost every state contains a provision expressly reserving the power of the purse to the legislature. For example, Article IV, § 19, of the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." This is almost identical to Article I, § 9, clause 7, of the federal Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." This allocation of authority is one of the essences of representative government. *See* 4 Op. Off. Legal Counsel 16, 19-20 (1980) (describing the goal that "Congress will determine for what purposes the government's money is to be spent and how much for each purpose" as "elementary to a proper distribution of governmental powers"). Indeed, this allocation reflects one of the rallying cries for the American Revolution — "No taxation without representation."

This allocation finds strong roots in both history and practical experience. As a historical matter, only religion can account more fully for the English Civil War of the Seventeenth Century than the struggle between Parliament and the Crown over the power of the purse. Whereas England entered that century with a relatively high degree of prerogative vested in the Crown, and with a relatively limited power lying in Parliament either to pay for the Crown's activities or to resist paying for them, by the end of that century Parliament had converted this power into a general authority to direct the affairs of government through control of the purse. As one commentator has aptly noted:

> The evolution of British representative democracy and the power of the purse are inextricably intertwined. English monarchs traditionally used Parliament as a means of raising revenues, usually to finance their military adventures. Over the centuries, British Parliaments began to use this revenue-raising authority to exact legislative concessions from the Crown, threatening to withhold funds if their demands were not met. Parliamentary insistence on a voice in governing the nation inevitably lead to struggle with the monarchy, which was not eager to surrender its royal prerogatives. The struggle came to a head during the reign of the Stuart kings in the 17th century. By the end of the century, the nation had suffered a protracted civil war, one king had lost his head, another had been deposed in a bloodless coup, and the supremacy of Parliament had been established. By the time of the American Revolution, Parliament's dominance over the British public fisc was complete.

R. Rosen, *Funding "Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 28-29 (1998). Similar conclusions can be drawn from the French Revolution. *See* Simon Schama, *Citizens: A Chronicle of the French Revolution* 289-90 (1989).

The allocation of the purse strings to the legislature also makes profound sense as a matter of practical politics. Although the people elect their governors, no branch of the government is more fully representative of the people, and more fully authorized to spend their money, than the legislature. The legislature reconstitutes the polity in its variety of backgrounds and experiences. Unlike executive officials, legislators are not subject to reporting relationships, nor do they have limited portfolios in any formal sense of the phrase. Instead, they have

a direct, inalienable right to deliberate over the full range of issues presented for resolution, and to cast their vote accordingly.

To be sure, the people of Nevada have chosen to complicate their legislative process by imposing a two-thirds requirement for the levying of new taxes. But this Court should be loathe to identify such a requirement as a stranger to republican government. In fact, many of the rules governing the legislative process are designed to make that process more deliberative and thereby to protect vulnerable minorities and produce more pleasing results. As James Madison explained in Federalist No. 51:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.

Nevada's super-majority requirement for new taxes is nothing more than a variation on this theme. Most notably, such a requirement protects vulnerable economic constituencies from targeted taxes. The people of Nevada may reasonably have concluded that it was altogether too easy for a simple majority of the two chambers of the legislature to impose taxes on select economic minorities, whereas concurrent super-majorities to impose the same taxes would not readily exist. By ordering the legislature of Nevada to disregard the state's super-majority requirement for new taxes, the Supreme Court of Nevada derogated radically and dangerously from the principle of popular control, through the legislature, over the purse.

It is true, of course, that the Constitution of Nevada contains a provision requiring the legislature to provide for public schools. *See* Nev. Const. art. XI, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year."). It is also true that the Supreme Court of Nevada, in issuing the decision that is the subject of the petition, purported to be enforcing this provision. *See Guinn*, 71 P.3d at 1275. But, in reading this provision as an essentially self-executing funding mechanism, with content to be judicially inferred, the Supreme Court of Nevada crossed the line between interpreting an organic legal document and governing without the consent of the population.[5]

As this Court is no doubt well aware, the constitutions of more than half the states require the legislatures thereof to provide for some support for education, often without elaborating on this abstract duty. The question then arises, whether courts could construe these provisions as a source of authority for the judiciary to impose taxes or appropriate funds, were the legislature not to act, without fatally undermining separation of powers. This is a profoundly difficult question, and one that would obviously call for delicate consideration, and strictly political resolution, if at all possible. As Justice Frankfurter observed in the somewhat similar circumstances of *Youngstown Sheet & Tube Co. v. Sawyer*:

> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that

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[5] In this regard, it must be noted that the people of Nevada have also chosen to retain at least some degree of sovereign immunity in their Constitution. *See* Nev. Const. art. IV, § 22 ("Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution.").

> arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle — preferably forever — a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.

343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). *See also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (commenting on separation of powers at the federal level) ("That this system . . . produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people . . . ."); *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . .").

In the decision that is the subject of this petition, the Supreme Court of Nevada seems to have made precisely the error identified by Justice Frankfurter in *Youngstown*. Instead of approaching the difficult issues of separation of powers, responsibility for the fiscal affairs of government, and the proper scope of sovereign immunity with the delicacy required by the situation, that Court seized upon one of the most extraordinary forms of relief available — a mandamus against the legislature, requiring it to levy new taxes without regard to specific constitutional restraints on the lawmaking process. Without doubt, the concept of a "Republican Form of Government" and government by divided power does not contemplate that such difficult situations as those presented in this case will be short-circuited by the judiciary. As Justice

Maupin noted in his separate opinion in the instant case, the doctrine of separation of powers stands — or ought to stand — as an "impediment" to immediate judicial resolution of a case such as this. *See Guinn v. Legislature of Nevada*, 71 P.3d at 1277 (Maupin, J., dissenting in part and concurring in part). As Justice Maupin aptly observed, "[c]ertainly, the specifics of creating a budget fall within the discretion of the Legislature." *Id.* at 1278 (Maupin, J., dissenting in part and concurring in part).

III. THIS CASE IS FULLY JUSTICIABLE.

Reports of the non-justiciability of disputes arising under the Guarantee Clause are greatly exaggerated, and certainly merit clarification from this Court. Nothing in the nature of the clause requires such treatment. It is not, for example, a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department." *Baker v. Carr*, 369 U.S. at 217. Indeed, the clause commits responsibility for the guarantee to the United States as a whole, which includes the courts. As Justice O'Connor recently indicated in her opinion for the Court in *New York v. United States*, there is merit in considering judicial application of the clause if circumstances will permit. *See* 505 U.S. at 184-85. Amici respectfully submit that such circumstances are presented here, in an egregious and patent violation of the principles of government by consent.

In fact, no case better illustrates the potential susceptibility of disputes arising under the Guarantee Clause to resolution on the merits than *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the precedent commonly cited for the proposition that cases arising under the Guarantee Clause are non-justiciable. In *Luther*, this Court refused to decide which of two competing

governments was the lawful government of Rhode Island after the so-called "Dorr's Rebellion." Subsequent decisions of this Court seemed to assume that *Luther* exposed an inherent non-justiciability in the clause, *see, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon* 223 U.S. 118, 142-3, 151 (1912), but in fact the decision in *Luther* turned quite simply on commonplace notions as to the limits of the judicial function.

For example, by the time the case arrived to the Court, the President had already exercised power vested in him by Congress to make the militia ready to restore order in the state if such a step proved necessary. *See Luther*, 48 U.S. (7 How.) at 43-44. The case also presented the courts with an evidentiary nightmare. Although it was technically an action for trespass, had the federal courts addressed the case on the merits, they would ultimately have had to decide whether the voters of Rhode Island had lawfully established a new government by constitutional convention. In a lengthy analysis, Chief Justice Taney explained that a court of the United States would not have been competent to judge the qualifications of every voter in the state and to ascertain whether the voters had lawfully adopted a new constitution and government. *See id.* at 41-42.

Given this state of affairs, the Court's decision to avoid deciding *Luther* on the merits was an unexceptional application of the multi-factored test for non-justiciable political questions articulated by Justice Brennan in *Baker*. *See* 369 U.S. at 217. Because Congress and the President had acted, it was no longer possible for this Court to resolve the case "without expressing lack of the respect due coordinate branches of government." *Id.* Similarly, given the steps the President had taken to resolve the situation, there arose "an unusual need for unquestioning adherence to a political decision already made," as well as a

"potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*[6] Finally, given the specific issues the case would have presented, the Court might also have discerned a "lack of judicially discoverable and manageable standards for resolving it," *id.*, — especially at that time.

As Justice Brennan aptly noted in *Baker*, 369 U.S. 186, this Court's approach to the subject of non-justiciable political questions is not categorical, but instead is driven by the circumstances of the cases presented for review. As he concluded in that opinion after considering the subject at length, "[t]he cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* at 217.

The Guarantee Clause is susceptible of judicial application in the appropriate case, and no case could be farther from the posture of *Luther v. Borden* than the instant one. Whereas, in *Luther*, Congress had already passed pertinent legislation and the President had already acted, in this case no other branch of the federal government has even purported to resolve the issues presented. Thus, there is no potential for "expressing lack of the respect due coordinate branches of government," nor is there "an usual need for unquestioning adherence to a political

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[6] It also bears notice that the issue of which of Rhode Island's two governments was lawful is conceptually similar to the issue of whether to recognize a foreign government as legitimate, or whether to recognize a particular group of Native Americans as a tribe, both of which Justice Brennan identified as political questions in his opinion for the Court in *Baker*. *See* 369 U.S. at 212, 215.

decision already made," or the "potentiality of embarrassment from multifarious pronouncements" on the issues presented. *Baker*, 369 U.S. at 217.

Finally, this Court has ample "judicially discoverable and manageable standards" for resolving this case. *Id.* The decision of the Supreme Court of Nevada that is the subject of this petition speaks for itself, and its incompatibility with the principles of government by consent is patent. If no structural rule governing the operation of the legislature of Nevada can stand up to the reasoning of that decision, and if that decision essentially transfers the power of the purse to the judiciary, then the decision radically and demonstrably deviates from the concept of a "Republican Form of Government." This Court is fully competent to review the decision of the Supreme Court of Nevada, and to require a resolution of the case in a manner not inconsistent with the Guarantee Clause.

CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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February 20, 2004

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In The
Supreme Court of the United States

HON. SHARRON E. ANGLE, et al.,
MEMBERS OF THE NEVADA STATE ASSEMBLY
AND NEVADA STATE SENATE,

Petitioners,

v.

KENNY GUINN, Governor of the
State of Nevada, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE INITIATIVE AND REFERENDUM INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Initiative & Referendum Institute respectfully requests leave to file the attached amicus curiae brief in support of petitioners. The consent of the attorney for petitioners has been obtained. The consent of the attorneys for respondents was requested but refused.

The Initiative & Referendum Institute is a non-profit, non-partisan research and educational organization dedicated to the study of initiative and referendum, and is the leading academic center in the United States for the study of direct democracy. Its sister organization, the Initiative & Referendum Institute Europe, studies the use of direct democracy throughout Europe, and an affiliate of the Initiative & Referendum Institute will soon open in Asia. The Institute was founded based upon the proposition that unbiased and factual information regarding the initiative and referendum process should be readily available to citizens, governments, and the media. The Institute does not support or oppose any issue that appears on the ballot through the use of the initiative or referendum process, but does believe the process, though not perfect, has become a vital and thriving example of citizen participation in government and a staple in American democracy.

As part of its mission, the Institute seeks to ensure that the initiative and referendum process is not limited by unconstitutional and arbitrary restraint. Thus, the Institute has a direct interest in ensuring that, unlike the Nevada Supreme Court in this case, courts give proper deference to the will of the people by enforcing the terms of initiatives and referenda.

Good cause exists for permitting this brief to be filed because it does not restate the arguments presented by petitioners, but instead (1) sets forth a more detailed background to the adoption of the specific initiative at issue in this case; (2) sets forth a history of direct democracy and the use of initiatives and referenda in the United States; and (3) identifies authority not cited in the petition demonstrating the constitutional importance of ensuring that courts enforce, rather than eviscerate, initiatives and referenda.

Neither party would suffer any undue prejudice if this brief is accepted for filing.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE

INTEREST OF AMICUS CURIAE

The Initiative & Referendum Institute[1] is a non-profit, non-partisan research and educational organization dedicated to the study of initiative and referendum, and is the leading academic center in the United States for the study of direct democracy. Its sister organization, the Initiative & Referendum Institute Europe, studies the use of direct democracy throughout Europe, and an affiliate of the Initiative & Referendum Institute will soon open in Asia. The Institute was founded based upon the proposition that unbiased and factual information regarding the initiative and referendum process should be readily available to citizens, governments, and the media. The Institute does not support or oppose any issue that appears on the ballot through the use of the initiative or referendum process, but does believe the process, though not perfect, has become a vital and thriving example of citizen participation in government and a staple in American democracy.

As part of its mission, the Institute seeks to ensure that the initiative and referendum process is not limited by unconstitutional and arbitrary restraint. Thus, the Institute has a direct interest in ensuring that, unlike the Nevada Supreme Court in this case, courts give proper deference to the will of the people by enforcing the terms of initiatives and referenda.

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[1] The Initiative & Referendum Institute has no parent corporation, and no publicly held company owns 10 percent or more of the Initiative & Referendum Institute. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the Initiative & Referendum Institute or its counsel, make a monetary contribution to the preparation or submission of this brief.

FACTUAL BACKGROUND

A. The initial passage of the Gibbons Tax Restraint Initiative by Nevada voters in 1994.

In 1992, Nevada's neighboring state, Arizona, passed an initiative requiring a two-thirds majority in the legislature to enact any tax increase. Virginia I. Postrel, *Voting Against Regulation*, Las Vegas Rev.-J., Nov. 18, 1992, at 9B. The following year, Nevada voters qualified the Gibbons Tax Restraint Initiative for the ballot, on which it appeared as "Question 11." Jane Ann Morrison, *Two Anti-Tax Propositions Losing Steam*, Las Vegas Rev.-J., May 4, 1994, at 1B; Jane Ann Morrison, *Gubernatorial Candidate Turns in Tax Initiative Petitions*, Las Vegas Rev.-J., June 2, 1994, at 2B.

The Gibbons Tax Restraint Initiative required a two-thirds vote of the state legislature to approve taxes. Jane Ann Morrison, *Group Targets Hikes in Fees, Taxes*, Las Vegas Rev.-J., Oct. 30, 1993, at 1B. If the legislature failed to muster a two-thirds majority, the proposed tax could be placed before the voters in the next general election, and passed by a majority vote. Major Garrett, *No Taxation Without a Vote? It's Coming Soon: Direct Democracy Catches On*, Wash. Times, July 21, 1994, at A10; Ed Vogel, *Gibbons' Tax Restraint Plan Debated*, Las Vegas Rev.-J., Oct. 26, 1994, at 2B.

Question 11 was criticized on the ground that it allowed a minority in the legislature to thwart the majority's will. Vogel, *Gibbons' Tax Restraint Plan Debated*, *supra*, at 2B; Albert Johns, *Voters Should Investigate Flaws of Gibbons Tax Restraint Initiative ACTION SENIORS*, Las Vegas Rev.-J., Sept. 18, 1994, at 7J. Nonetheless, the initiative passed with 78 percent of the vote in the 1994 election. Ed Vogel, *Senate OKs Measure Requiring Two Votes on Any Tax Hikes*, Las Vegas Rev.-J., June 23, 1995, at 7B.

B. The second passage of the Gibbons Tax Restraint Initiative by Nevada voters in 1996.

In the November 1996 election, Nevadans again overwhelmingly approved – by more than 70 percent – Question 11. *Voters Come Through*, Las Vegas Rev.-J., Nov. 7, 1996, at 10B; Sean Whaley, *Gibbons Off to Congress, Leaving Tax Legacy Behind*, Las Vegas Rev.-J., Nov. 8, 1996, at 1B. In doing so, the voters rejected efforts by the legislature to pass a less-restrictive alternative plan which did not include the two-thirds provision. Vogel, *Senate OKs Measure Requiring Two Votes on Any Tax Hikes, supra,* at 7B; *Legislature Offers Tax-Restraint Choice*, Las Vegas Rev.-J., July 3, 1995, at 2B; Jake Mattox, *Business Community Watching Ballot Questions*, Las Vegas Bus. Press, Oct. 21, 1996. In the same election, southern Nevada voters also approved a massive bond measure for new schools and a substantial property tax increase for additional police officers – suggesting support for Question 11 was not about preventing tax increases so much as giving voters greater control over those increases. *Voters Come Through*, *supra*, at 10B.

C. The 2003 nullification of the Gibbons Tax Restraint Initiative.

1. The Legislature's manufacturing of a "crisis."

A review of tax increases approved by the Nevada legislature before Question 11 took effect showed that few of those increases would have been affected by the two-thirds requirement. Whaley, *Gibbons Off to Congress, Leaving Tax Legacy Behind*, *supra*, at 1B. And, in the years following the passage of Question 11, only 35 bills out of 1,167 introduced required a two-thirds vote, and the two-thirds majority requirement did not play any major

role with respect to those bills. Sean Whaley, *Supermajority Vote Not Taxing to Lawmakers*, Las Vegas Rev.-J., Aug. 17, 1997, at 1B.

By the end of 2002, however, Nevada was facing a shortfall in state revenues and Governor Guinn proposed nearly $1.1 billion in new taxes over the next two years, representing a 28 percent increase over current spending. Ed Vogel, *State of the State: Guinn Urges Courage*, Las Vegas Rev.-J., Jan. 21, 2003, at 1A; Ed Vogel, *Magazine Ranks Nevada Tax System Nation's Worst*, Las Vegas Rev.-J., Feb. 3, 2003, at 8A; Ed Vogel, *Guinn Cruises to Easy Re-Election Win Over Neal*, Las Vegas Rev.-J., Nov. 6, 2002, at 4B.

Instead of funding a complete budget at one time, the Nevada legislature used existing revenues to fund non-education portions of the budget, leaving the state's $1.65 billion public schools budget 50 percent unfunded for 2003-2005. Cert. Pet. 5-6; Sean Whaley, *Initiative Petition: New Amendment Pushed*, Las Vegas Rev.-J., July 13, 2003, at 1B. By June 2003, bills to levy record tax increases had failed in both of Nevada's legislative chambers. Ed Vogel, *Special Session: Tax Measures Fail*, Las Vegas Rev.-J., June 8, 2003, at 3A. Although majorities in both houses had backed the tax measures, neither house could muster the two-thirds support necessary to pass a tax increase under Question 11. *Id.*

After two special sessions failed to resolve the legislative stalemate over tax increases, and with the new fiscal year beginning, Governor Guinn sued the legislature rather than permit the matter to be submitted directly to the voters as required by Question 11 when a two-thirds legislative majority cannot be achieved. *Id.*; Whaley, *Initiative Petition: New Amendment Pushed*, *supra*, at 1B. Polls showed that had the proposed tax increase been submitted to the voters, its fate was uncertain. Jane Ann Morrison, *Poll: Voters Favor Anti-Tax Legislators, School Spending*, Las Vegas Rev.-J., July 11, 2003, at 1A.

2. The Nevada Supreme Court's nullification of the constitutional requirements set by the voters for raising taxes.

In response to Governor Guinn's lawsuit, the Nevada Supreme Court took the novel step of refusing to enforce the provision of the state constitution requiring two-thirds of the legislature to vote in favor of a tax increase, and instead determined that a simple majority would be sufficient to pass the increase. *Guinn v. State Legislature*, 71 P.3d 1269, 1275-76 (Nev. 2003).

The court concluded that the "substantive educational rights" in the constitution must trump the mere "procedural requirement" or "process requirement" that the two-thirds provision represented. *Id.* at 1275-76. With no apparent relevance to any constitutional analysis, the court emphasized that "[i]n 1993, the Legislature rejected a resolution that proposed to amend the Constitution to create an exception to the simple majority rule and require a two-thirds majority of each house to increase existing taxes or impose new taxes. Ultimately, by initiative, the citizens accepted an identical proposal as a constitutional amendment." *Id.* at 1273.

3. The continuing impact of the Nevada Supreme Court's opinion.

Legal experts and politicians feared the court's decision setting aside the state's supermajority requirement could have implications in the fourteen other states with supermajority or other constitutional restrictions on legislative tax power. Carri Geer Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, Las Vegas Rev.-J., July 12, 2003, at 1A; Lisa Kim Bach, *Republicans Ask Supreme Court to Revisit Decision on Taxes*, Las Vegas Rev.-J., July 22, 2003, at 1A; Ed Vogel, *Divisive Tax Ruling Argued*, Las Vegas

Rev.-J., July 26, 2003, at 1B. Indeed, soon after the decision, California State Superintendent of Public Instruction Jack O'Connell announced that he intended to ask the California Supreme Court to force a "Nevada-style break in the state budget deadlock" by "'seeking a ruling that would suspend the two-thirds requirement for passing a budget or increasing revenues, and instead, allow a simple majority.'" Daniel Weintraub, *It's Catching: Suspend the Constitution*, Sacramento Bee, July 17, 2003, *available at* http://www.sacbee.com/static/weblogs/insider/archives/2003-07.html.

One legal scholar, UCLA law professor Eugene Volokh, characterized the decision as "shameful," and pointed out that under the court's assumption "that procedural requirements are somehow less important than substantive rights," even a simple majority requirement for a tax increase could be nullified as a mere "'procedural requirement that is general in nature.'" Eugene Volokh, *The Volokh Conspiracy*, July 10, 2003, *at* http://volokh.com/2003_07_06_volokh_archive.html. Gary Peck, executive director of the ACLU of Nevada, said members of the organization were troubled by the reasoning of the Nevada Supreme Court in reaching its decision, "'particularly the dubious distinction it made between substantive and procedural constitutional rights,'" which "'might be used to improperly create a hierarchy of rights inconsistent with core constitutional principles.'" Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, *supra*, at 1A.

On July 21, 2003, both houses of the Nevada legislature passed an $836 million tax package funding the public schools and state government by a two-thirds vote. Sean Whaley & Ed Vogel, *State Legislature: Budget Approved*, Las Vegas Rev.-J., July 22, 2003, at 1A. Fifteen members – one more than needed to block a two-thirds vote in the 42-member Assembly – were previously steadfast in their refusal to support the tax increase, due to its

size. *Id.* That changed when Assemblyman John Marvel provided the crucial 28th vote necessary to achieve the two-thirds supermajority in the Assembly at 11:37 p.m. *Id.*; Ed Vogel, *More Time Sought in Tax Case*, Las Vegas Rev.-J., Dec. 6, 2003, at 4B. The Supreme Court decision caused the two-thirds vote to occur as Marvel said "he voted for the tax increase only to avoid a 'constitutional crisis' if the Legislature violated the two-thirds rule." Ed Vogel, *More Time Sought in Tax Case*, Las Vegas Rev.-J., Dec. 6, 2003, at 4B; Ed Vogel, *Experts Say High Court Should Not Rehear Its Decision*, Las Vegas Rev.-J., July 29, 2003, at 5B.

The Legislative Counsel conceded the role the court's decision played in compelling the two-thirds supermajority vote: "'Its interpretation of the Nevada Constitution led to a chain of events that ultimately resulted in the passage by a two-third majority vote of the constitutionally mandated election funding and the revenue necessary to support it.'" Vogel, *Experts Say High Court Should Not Rehear Its Decision*, *supra*, at 5B.

After the vote, Nevada Assembly Minority Leader Lynn Hettrick expressed continuing concern about the Nevada Supreme Court's decision despite the two-thirds vote: "'Legislatures are not secure across this entire land with that decision.'" Bach, *Republicans Ask Supreme Court to Revisit Decision on Taxes*, *supra*, at 1A. From the opposite perspective, an amicus brief filed by the Nevada State Education Association in opposition to a rehearing petition in the Nevada Supreme Court urged the court not to withdraw the opinion because a similar problem is "'likely to recur.'" Vogel, *Divisive Tax Ruling Argued*, *supra*, at 1B.

SUMMARY OF ARGUMENT

"We the people of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. Const. pmbl. James Madison further elaborated that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived." The Federalist No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

Through its constitutional initiative process, Nevada citizens amended the state's constitution to require a two-thirds vote of the legislature to raise taxes. But, through judicial fiat, the Nevada Supreme Court effectively read that provision out of the constitution, finding that a simple majority vote will suffice to raise taxes when the two-thirds requirement proves inconvenient. The Nevada Supreme Court has now enshrined in the law two radical and dangerous legal propositions – (1) that constitutional provisions passed via the initiative or referendum process are entitled only to second-class status; and (2) that constitutional requirements governing the vote requirements for imposing taxes are merely "procedural" requirements and readily subject to non-enforcement.

The petition for writ of certiorari demonstrates that the opinion is erroneous and worthy of review by this court for a number of reasons. Instead of repeating the specific arguments advanced in the petition, and consistent with the educational mission of the Initiative & Referendum Institute, we will set forth two complementary points demonstrating the vital importance of the issues raised by this petition.

First, we will outline the long historical commitment in the United States to the use of direct democracy by citizens to advance and improve society. Second, we will demonstrate the substantial commitment of courts across the nation to the enforcement of initiatives and referenda.

Those courts, in conflict with the Nevada Supreme Court, have recognized that the enforcement of initiatives and referenda passed by the people represents a vital component of our democracy.

LEGAL ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF INITIATIVES AND REFERENDA TO OUR DEMOCRACY.

A. The United States has a long-standing historical commitment to direct democracy.

1. Direct democracy via citizen assemblies predated the Revolution.

Direct democracy dates back to ancient times. In many of the ancient Greek city states, all adult citizens were permitted to meet and participate directly in decisions made by the government. John Allswang, The Initiative and Referendum in California, 1898-1998 2 (2000); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 839 (2002). Rome and Carthage also permitted citizens to participate directly in lawmaking. Natelson, at 839-40.

This tradition of direct democracy was revived in New England, where citizens gathered in town meetings to vote on ordinances and other issues relating to governance of their communities. M. Dane Waters, Initiative and Referendum Almanac 3 (2003); David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 3-4 (1989); Allswang, *supra*, at 2; Clayton P. Gillette, *Is Direct Democracy Anti-Democracy?*, 34 Willamette L. Rev. 609, 615-16 (1998); William T. Mayton, *Direct Democracy, Federalism & The Guarantee Clause*, 2 Green Bag 269, 272-73 (1999).

In addition, even where a representative body held ultimate authority, popular assemblies could dictate to their representatives how to vote on specific issues. Gillette, *supra*, at 615.

2. The popular referendum played a significant role in the shaping and ratification of state constitutions in the aftermath of Independence.

Although ultimately not included in its final form, Thomas Jefferson proposed adding a provision for legislative referendum to the 1775 Virginia constitution based upon his view that the people are sovereign and should approve any future changes to the constitution. Waters, *supra*, at 3; Schmidt, *supra*, at 4. By 1776, the new Georgia state constitution required a majority of voters in each county to sign petitions calling for a constitutional convention before any future constitutional amendments could be adopted. *Id.*

In 1778, Massachusetts held a statewide referendum to ratify its new constitution. *Id.* Similar voter approval of state constitutions occurred in New Hampshire in 1792, in Connecticut in 1818, in Maine in 1819, in New York in 1820 and in Rhode Island in 1824. *Id.*; *see* Gillette, *supra*, at 616. All states entering the union after 1857 were required to submit their constitutions to the voters for approval. Waters, *supra*, at 3; Schmidt, *supra*, at 5.

This activity caused Alexis De Tocqueville to note that:

> At the present day the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive. It is unencumbered by those fictions which are thrown over it in other countries, and it appears in every possible form, according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as at Athens; and sometimes its representatives,

> chosen by universal suffrage, transact business in its name, and under its immediate supervision.

Alexis De Tocqueville, Democracy in America 57 (Richard D. Heffner, ed., 1984).

3. By the beginning of the 20th Century, the Progressive and Populist movements caused many states to amend their constitutions to provide their citizens with the initiative and referendum in order to promote needed reforms.

At the dawn of the twentieth century, the Populist and Progressive movements contended that government was not responsive to the major problems of the day because it was controlled by wealthy special interests. Waters, *supra*, at 3; Schmidt, *supra*, at 5-8. Some of their proposed reforms included women's suffrage, secret ballots, direct elections of United States Senators, recall, and primary elections. Waters, *supra*, at 3; *see* Schmidt, *supra*, at 9. The initiative process was viewed as vital to the passage of the other reforms because the entrenched interests who controlled state legislatures were blocking their passage. Schmidt, *supra*, at 7-8; Waters, *supra*, at 3.

William Jennings Bryan argued that the initiative "is the most effective means yet proposed for giving the people absolute control over their government." John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 Rutgers L.J. 933, 979-80 (1999). Theodore Roosevelt, in his "Charter of Democracy" speech, stated that "I believe in the Initiative and Referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresenatative." Schmidt, *supra*, at 9. Woodrow Wilson said: "We are cleaning house and in order to clean house the one thing we need is a good broom. Initiative and Referendum are good brooms." *Id.* at 10. Samuel Gompers, president of

the American Federation of Labor (AFL), viewed the initiative and referendum process "as a peaceful way to achieve union objectives, vastly preferable to costly, potentially bloody strikes." *Id.* at 6. State AFL offices became a driving force behind the passage of the initiative and referendum process around the nation. *Id.* at 7.

Numerous states adopted the initiative and referendum around the turn of the twentieth century. Waters, *supra*, at 4, 294; Schmidt, *supra*, at 8, 250.

4. Initiatives and referenda are an important part of our modern democracy.

a. Nevada, like many other states, provides its citizens with the initiative process.

Today, twenty-four states have an initiative process of some sort. Waters, *supra*, at 11. Nevada is one of eighteen states having a *constitutional* initiative process. *Id.* at 11-12. For constitutional initiatives, Nevada and 15 other states use a "direct initiative amendment" approach, under which a constitutional amendment is proposed by the people and placed directly on the ballot for voter approval or rejection.[2] *Id.* The other two states use an "indirect initiative amendment" approach, under which a constitutional amendment proposed by the people must

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[2] To put an initiative on the Nevada ballot, valid signatures from at least 13 of Nevada's 17 counties and equal to at least 10 percent of the total votes cast at the last general election must be obtained. Dean Heller, Secretary of State, State of Nevada Initiative & Referendum Guide 2002 3, *available at* http://sos.state.nv.us/nvelection/int_ref/initiative.pdf; Nev. Const. art. XIX, § 2, cl. 2. If approved by a majority vote, the initiative is submitted again to the voters in the next general election. Heller, *supra*, at 3; Waters, *supra*, at 26. If the initiative passes a second time, it becomes part of the Nevada Constitution. Heller, *supra*, at 3; Nev. Const. art. XIX, § 2, cl. 4.

first be submitted to the state legislature before the amendment can appear on the voter ballot. *Id.*

Nevada is also one of 21 states with a *statutory* initiative process. *Id.* Nevada uses an "indirect initiative statute" (IDS) approach *id.*, under which a new state statute or an amendment to an existing state statute can be proposed. Heller, *supra*, at 1. Under the IDS approach, used in nine states (including Nevada), a statute proposed by the people must first be submitted to the state legislature for consideration before it can be placed on the voter ballot. Waters, *supra*, at 11. By contrast, under the direct initiative statute approach used in 14 other states, statutes proposed by the people are placed directly on the ballot. *Id.*[3]

b. Laws adopted in Nevada and nationwide through initiatives and referenda have spanned the ideological spectrum.

Despite the widespread availability of initiatives and referenda, laws resulting from them comprise an extremely small percentage of all laws passed. Natelson, *supra*, at 807-08. Since 1904, when the first statewide initiative appeared on a ballot, citizens in 24 states have placed approximately 2,051 statewide initiatives on the ballot and have approved 840, or 41 percent, of them. Waters, *supra*, at 7.

Nonetheless, a wide range of issues, covering all portions of the ideological spectrum, have become law across the country due to the initiative and referendum process. For example, initiatives and referenda have

[3] Two of the 21 states having the statutory initiative procedures – Utah and Washington – allow statutory initiatives through both the direct initiative statute and indirect initiative statute methods. Waters, *supra*, at 11.

conferred suffrage to women, abolished poll taxes, created the eight hour workday, legalized physician-assisted suicide, legalized medical marijuana, outlawed the use of steel traps in hunting, permitted the sale of yellow margarine, permitted movie theaters and other stores to be open on Sunday, provided for the election of politicians in direct primaries, adopted various campaign finance reforms, imposed term limits on elected officials, and adopted bottle taxes and other measures to protect the environment. *Id.* Initiatives and referenda have also ended bilingual education, required parents to be notified prior to a minor's abortion, prohibited states from funding abortions, adopted and abolished prohibition, and adopted and abolished the death penalty. *Id.*

The experience in Nevada is consistent with this national trend. Twenty-five of the 39 initiatives on the ballot between 1918 and 2000 have passed, for an overall passage rate of 64 percent. Waters, *supra*, at 295-96. As in other states, initiatives in Nevada have spanned the political spectrum. *Id.* at 294; Schmidt, *supra*, at 250-51.

Since 1978, the vast majority of Nevada's initiatives (20 of 26) have concerned taxation, term limits, or campaign finance reform. Waters, *supra*, at 295-96; State Initiative & Referendum Petitions Circulating in 2002, *available at* http://sos.state.nv.us/nvelection/int_ref/2002 int_refer.htm. In 2000, however, the voters passed both a civil rights initiative banning same sex marriage and a drug policy reform initiative permitting the medical use of marijuana – illustrating in a single election cycle that use of Nevada's initiative process has not been limited to one political ideology. Waters, *supra*, at 296.

c. The initiative and referendum process has often been used by the people to address tax issues.

Taxes rank first on the list of subjects that citizens have historically addressed using the initiative process. *Id.* at 481. In recent years, voter initiatives have been used by tax reform advocates concerned that the elected establishment is unresponsive to their cause. *Id.* at 496. For example, the so-called voter "tax revolt" movement has been sustained by the initiative process. *Id.*

The modern starting point for this phenomenon was California's Proposition 13, a 1978 property tax limitation measure. *Id.* In 1980, Massachusetts voters restricted local property taxes to no more than 2-1/2 percent of a home's full and fair cash value, and required a two-thirds voter approval for any increase in the rate. *Id.* The same year, Missourians enacted a measure limiting total state tax and spending growth, and subjecting most local tax and fee increases to two-thirds voter consent in the affected jurisdiction. *Id.* at 496-497. Over the next decade, similar initiatives met with varying degrees of success in Michigan, Montana, Nebraska, Oregon, and Washington. *Id.* at 497.

These efforts, which were aimed at property taxes, led to a second wave of tax initiatives as state legislatures explored other sources of funding for government expenditures. *Id.* This second wave focused more heavily on processes (e.g., voter approval and legislative supermajorities) than outcomes. *Id.* For example, in 1992 Oklahoma voters required a three-fourths legislative "supermajority" or a majority vote of the people for all state-level tax increases. *Id.* The same year, Colorado voters limited the growth of state spending and revenues to the rate of inflation and population. *Id.*

Prior to 1978, only four voter approval/supermajority tax safeguards could be found in state constitutions. *Id.*

Since 1978, ten such laws have been enacted. *Id.* In fact, in the same election year that Nevada voters approved the initiative at issue here, voters in Florida, South Dakota, California and Oregon similarly made tax increases more difficult. Pete Du Pont, Editorial, *The Little Noticed Tax Revolt of 1996*, Orange County Reg., Nov. 17, 1996, at J04; James Perry, Commentary, *Americans Want Less Taxation, Now*, Wash. Times, Dec. 12, 1996, at A19; *Restraining Government*, Las Vegas Rev.-J., Jan. 13, 1997, at 6B.

B. The Nevada Supreme Court is in conflict with many other courts that have recognized the vital importance of initiatives and referenda.

1. Courts should liberally construe and defer to citizen-passed initiatives and referenda.

The Nevada Supreme Court has evidenced a hostility to the fundamental democratic principle that citizens should be able to make laws and, in essence, has relegated initiatives and referenda to second-class status. *See Guinn,* 71 P.3d at 1273-76. That view of initiatives and referenda is in conflict with decisions from numerous other courts, including this one.

This court has noted that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971); *see also City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976) (stating a referendum is "a basic instrument of democratic government"); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) ("An expression of the popular will expressed by majority plebiscite . . . must not be cavalierly disregarded.").

Various state courts have similarly affirmed the importance of initiatives and referenda to our democracy. For example, the adoption of a constitutional provision permitting citizen initiatives has been held to have "'created a

people's process. It was intended to provide both a check on legislative action and a means of circumventing an unresponsive [legislature]. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action.'" *Citizens for a Competitive Massachusetts v. Sec'y of the Commonwealth*, 594 N.E.2d 855, 858 (Mass. 1992); *see also Miller v. Sec'y of the Commonwealth*, 697 N.E.2d 123, 126 (Mass. 1998); *Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985); Lino A. Graglia, *Revitalizing Democracy*, 24 Harv. J.L. & Pub. Pol'y 165, 168 (2000).

"'Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process."'" *Rossi v. Brown*, 889 P.2d 557, 560, 38 Cal. Rptr. 2d 363, 366 (1995); *see also Wagner v. Sec'y of State*, 663 A.2d 564, 566 (Me. 1995); *Oliver v. City of Tulsa*, 654 P.2d 607, 613 (Okla. 1982).

Accordingly, "'[i]t has long been our judicial policy to apply a liberal construction to [initiatives and referenda] wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'" *Rossi*, 889 P.2d at 560; *see also Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Pacuilla v. Cochise County Bd. of Supervisors*, 923 P.2d 833, 834 (Ariz. 1996); *Porter v. McCuen*, 839 S.W.2d 521, 522 (Ark. 1992); *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996); *Citizens for a Competitive Massachusetts v. Sec'y of the Commonwealth*, 594 N.E.2d at 858; *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984); *State ex rel. Hodges v. Taft*, 591 N.E.2d 1186, 1189 (Ohio 1992); *Oliver*, 654 P.2d at 613.

Although this court has approved the initiative and referendum process in general terms, it has yet to address whether, and under what circumstances, a court can ever override an initiative or referendum in order to achieve a desired result. This court should therefore grant the petition for writ of certiorari and define the extent to which citizen initiatives and referenda must be accorded deference by the courts under our republican government.

2. Courts should recognize that failing to enforce a citizen initiative or referendum violates the fundamental rights of the voters who passed them.

The Nevada Supreme Court justified its failure to enforce the tax provision contained in the Nevada Constitution on the basis that it was merely a "procedural" provision. *See Guinn*, 71 P.3d at 1275-76. In so doing, the court essentially nullified the votes of the people in two separate Nevada elections. This failure to give effect to the will of the people violated the fundamental rights of those voters, in conflict with authority from other jurisdictions.

"The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them.'" *Rossi*, 889 P.2d at 560; *see also Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977); *Winkle v. City of Tucson*, 949 P.2d 502, 504 (Ariz. 1997); *In re Opinion of Justices*, 275 A.3d 800, 803 (Me. 1971); *State ex rel. Hodges*, 591 N.E.2d 1189; *Byre*, 362 N.W.2d at 79; *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999).

"The reserved right and power of initiative is a fundamental right. . . . For decades, we have recognized that the right to vote is a fundamental right. . . . Initiative is the power of a voter to directly legislate via exercising the right to vote. Like the right to vote generally, the initiative right guarantees participation in the political process. It is a constitutionally guaranteed right that 'forms an implicit

part of the life of a free citizen in a free society.' The initiative right encourages political dialogue and allows the general populace to have substantive and meaningful participation in enacting legislation that impacts society. It is democracy in its most direct and quintessential form." *Gallivan v. Walker*, 54 P.3d 1069, 1080-81 (Utah 2002) (citations omitted); *see also Bd. of County Comm'rs v. County Road Users Ass'n*, 11 P.3d 432, 439 (Colo. 2000) ("'Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government.'").

"[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003); *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).

These courts, unlike the Nevada Supreme Court, have all recognized that a citizen initiative or referendum cannot be ignored without infringing the fundamental rights of those who voted for it. This court should therefore grant the petition for writ of certiorari and define the parameters for determining when the nullification of a vote of the people impermissibly violates their fundamental rights.

CONCLUSION

In Federalist No. 39, Madison argued: "we may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government that it be derived from the great body of the society. . . ." The

Federalist No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961). The Nevada Supreme Court's decision turns that founding principle upside down, negating the will of Nevada's citizens and granting the Legislature powers derived not from "the great body of the people," but rather bestowed upon that legislative body by judicial fiat. Certiorari should be granted to confirm that the initiative and referendum power is a fundamental right and a core aspect of our republican government, and cannot be thwarted by a state judiciary for reasons of mere political expediency.

Respectfully submitted,

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MOTION FILED

FEB 2 0 2004

(5)

No. 03-1037

In the

Supreme Court of the United States

SHARRON E. ANGLE, et al.,

Petitioners,

v.

HON. KENNY C. GUINN, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA LEGISLATORS* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) and the following named members of the Legislature of California respectfully move this Court for leave to file the attached amicus curiae brief in support of Petitioners, Sharron Angle, *et al.* Consent to the filing of this brief has been granted by counsel for Petitioners, and has been lodged with the Clerk of this Court. Although Respondent Legislature of Nevada and Respondent Hon. Mark Amodei, *et al.*, have granted their consent, Respondent Hon. Kenny Guinn has withheld consent, necessitating the filing of this motion.

PLF is joined in this motion by the following members of the California Legislature:

Members of the California Assembly

Hon. Greg Aghazarian, 26th Assembly District

Hon. Patricia Bates, 73d Assembly District

Hon. John Benoit, 64th Assembly District

Hon. Russ Bogh, 65th Assembly District

Hon. John Campbell, 70th Assembly District

Hon. Dave Cogdill, 25th Assembly District

Hon. Dave Cox, 5th Assembly District

Hon. Bob Dutton, 63d Assembly District

Hon. Bonnie Garcia, 80th Assembly District

Hon. Tom Harman, 67th Assembly District

Hon. Ray Haynes, 66th Assembly District

Hon. Guy Houston, 15th Assembly District

Hon. Rick Keene, 3d Assembly District

Hon. Doug La Malfa, 2d Assembly District

Hon. Jay La Suer, 77th Assembly District

Hon. Ken Maddox, 68th Assembly District

Hon. Abel Maldanado, 33d Assembly District

Hon. Bill Maze, 34th Assembly District

Hon. Kevin McCarthy, 32d Assembly District

Hon. Dennis Mountjoy, 59th Assembly District

Hon. Alan Nakanishi, 10th Assembly District

Hon. Robert Pacheco, 60th Assembly District

Hon. George Plescia, 75th Assembly District

Hon. Keith Richman, 38th Assembly District

Hon. Sharon Runner, 36th Assembly District

Hon. Steve Samuelian, 29th Assembly District

Hon. Tony Strickland, 37th Assembly District

Hon. Mark Wyland, 74th Assembly District

Members of the California Senate

Hon. Dick Ackerman, 33d Senate District

Hon. Jim Battin, 37th Senate District

Hon. Ross Johnson, 35th Senate District

Hon. Dennis Hollingsworth, 36th Senate District

Hon. Pete Knight, 17th Senate District

Hon. Tom McClintock, 19th Senate District

Hon. Bruce McPherson, 15th Senate District

Hon. Bill Morrow, 38th Senate District

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF participated as amicus in the Supreme Court of Nevada in this case.

PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and individual rights. PLF has defended taxpayers in cases involving the constitutional rights of representation and the balance of power between states and the federal government, including participating as amicus in *City of Rome v. United States*, 446 U.S. 156 (1980), *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), and *United States v. Lopez*, 514 U.S. 549 (1995).

Amici urge this Court to grant review. In addition to the Petitioners' due process and equal protection claims, the decision below violates the Constitution's Republican Guarantee Clause. That Clause prohibits a sudden and undemocratic shift in the operations of government from immediately altering the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their state constitutional provisions. Because of the unusual nature of the Guarantee Clause argument, and unique circumstances of this case, Amici believe that further discussion will aid this Court in considering the petition. Amici Pacific Legal Foundation and members of the California Legislature believe that they can add insight as to why it is important for this Court

to grant the petition and respectfully request that this motion to file a brief amicus curiae be granted.

DATED: February, 2004.

Respectfully submitted,

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QUESTION PRESENTED

The Nevada Constitution requires all tax bills to receive a two-thirds vote in the Legislature. When a tax bill fell one vote short, the State Supreme Court ordered the Legislature to disregard the two-thirds requirement and proceed under simple majority rule. Does such an order violate the federal Constitution's guarantees of a republican form of government, due process of law, and the right to have one's vote counted?

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ended its regular session on June 3, 2003, without passing an education budget.

That day, Governor Guinn exercised his constitutional authority to call the 19th special session of the Legislature and to limit the issues for that session solely to education spending and tax increases. Notwithstanding lengthy negotiations, and repeated requests to reopen past spending decisions, no legislative agreement was reached. Gov. Guinn dissolved the session on June 12, rather than allowing the Legislature to consider cutting previous spending levels. Later that day, he called the 20th special session, again prohibiting the Legislature from reconsidering previous spending decisions. Still lacking the votes to pass a tax increase, the Legislature again failed to pass an education budget and tax bill. The tax increase bill ("SB 6") fell *a single vote short* of the constitutionally required two-thirds.

At midnight on July 1, Governor Guinn filed in the Nevada Supreme Court a petition for a writ of mandamus against the Legislature and individual Legislators, to compel them to appropriate money for schools and to increase taxes. After expedited briefing, the court granted the writ on July 10, ordering the Legislature to disregard the two-thirds provision and "proceed . . . under simple majority rule." *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269, 1276 (Nev. 2003) (*Guinn I*). The court explained that "[w]hen a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield." *Id.* at 1275. The state supreme court suspended the two-thirds requirement for raising taxes, again characterizing it as merely "procedural." *Id.* at 1276. Shortly thereafter, the Assembly convened and voted on SB 6. It received a simple majority vote, not two-thirds, but (ignoring Petitioners' point of order) the Speaker of the Assembly declared the bill "passed."

Shortly thereafter, the holdout legislators filed a lawsuit in district court challenging the Speaker's declaration that the bill had passed. Within a week, the court dismissed that challenge on the grounds that under the *Rooker-Feldman* abstention doctrine, either the state supreme court should grant a petition for rehearing or this Court should intervene. *Angle v. Legislature of the State of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003). The Petitioners immediately filed a motion for reconsideration in the Nevada Supreme Court. Shortly thereafter, the Assembly voted on a second tax-increase bill, "SB 5," which again received a simple majority vote, rather than the constitutionally required two-thirds. This, too, the Speaker deemed as passed by a simple majority. These bills were then transmitted back to the Senate, where no further action has been taken on them. Shortly after these bills were returned to the Senate, one legislator, wishing to avoid a "constitutional crisis," decided to vote for a tax increase, and a third tax increase bill, called "SB 8," received a two-thirds vote and was deemed passed. This bill passed the Senate by two-thirds as well and was signed into law. SB 5 and SB 6, though allegedly "passed," have not yet been signed by the Governor.

On September 17, the state supreme court denied the Petitioners' motion for reconsideration, but also refused to vacate its former decision as moot under the doctrine of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Guinn v. Legislature of the State of Nevada*, 76 P.3d 22, 33 n.46 (Nev. 2003) (*Guinn II*). Instead, the court "clarified" its earlier ruling:

> To avoid an impasse harmful to public education, we determined that the supermajority provision could not be improperly used to avoid majority rule on budget appropriations. Accordingly, we held that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget

> . . . . Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties.

Id. at 32-33.

Now, individual legislators, named as defendants in the original proceedings, petition this Court for a writ of certiorari on the grounds that the decision below violates the Fourteenth Amendment—by depriving Petitioners of their right to have their votes counted and their right to due process of law—as well as the Republican Guarantee Clause of Article IV of the United States Constitution.

SUMMARY OF ARGUMENT

The Nevada Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). This case provides a rare opportunity for the Court to clarify the standards under which citizens may seek protection under the Republican Guarantee Clause, U.S. Const. art. IV, § 4. This Court has often described in dicta the type of facts that could constitute a violation of the Clause—this case meets those criteria. There are no compelling reasons to regard Petitioners' claim as a political question, because there is no dispute with a coordinate branch of the federal government and there are judicially manageable standards for applying the Guarantee Clause in this case. The Clause protects citizens against a sudden and undemocratic shift in the operations of government which immediately alters the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional provisions.

In this case, the Nevada Supreme Court permitted a sudden and undemocratic shift in the state's method of functioning and allowed two bills to be "passed" in violation of

the constitutionally required two-thirds vote. This Court has explained that citizens may assert the Guarantee Clause when the state government ceases to operate by the "orderly and settled methods prescribed by its fundamental law," *Taylor v. Beckham*, 178 U.S. 548, 580 (1900), or stops following "the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes." *Duncan v. McCall*, 139 U.S. 449, 462 (1891). That is precisely what has happened here. Moreover, since the state supreme court refused to vacate its decision, the Nevada Legislature apparently retains the power to ignore the two-thirds requirement at any future date.

What the court below called a "constitutional conflict" was in fact deliberately created for political purposes by the Governor's choice to limit the scope of the special legislative sessions. The only reason the court felt it necessary to disregard the two-thirds vote requirement that the people adopted for tax increases was because the Governor, through procedural manipulations, prohibited the Legislature from addressing education funding through actions it could take by simple majority votes (i.e., cutting spending in other areas). The state supreme court chose to resolve this manufactured conflict through the drastic action of giving the Legislature a "pass" as to the constitutional vote requirements, when the impasse could easily have been resolved through regular legislative process by directing the Governor to allow the Legislature to consider the spending matters. This would have ensured that the Legislature fund education without setting aside any constitutional provisions, by requiring that the Legislature reopen its debate on the budget. Note: *Nevada Supreme Court Sets Aside a Constitutional Amendment . . .*, 117 Harv. L. Rev. 972, 976 (2004) (hereafter "*Sets Aside*") ("Had the court in *Guinn* deferred to the legislature by requiring it to fund education, without favoring a specific means of doing so, it would have avoided tension between constitutional provisions").

This case is not of merely academic significance. As Petitioners note, at least fifteen other states have supermajority requirements for tax increases. Political forces in those states, seeking to evade those requirements, look upon this decision as an opportunity to erase them. Indeed, shortly after the Nevada Supreme Court reached its decision, California Superintendent of Public Instruction Jack O'Connell held a press conference to announce that he would file a similar lawsuit in the California Supreme Court. *See* Jessica Portner, *Simple Majority Sought on Budget: Schools Chief to Ask High Court to Help Unlock Money for Education*, San Jose Mercury News, July 18, 2003 (2003 WL 57855730). Although the California budget impasse ended before O'Connell filed his suit, there is real potential that such tactics will be used to seriously damage state constitutional safeguards for taxpayers. *See, e.g.*, David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 Ark. L. Rev. 519, 538-39 (2003) (noting possibility of *Guinn*-style case in Arkansas). This Court should at least protect Nevadans against the Nevada Supreme Court's unprecedented decision to erase the state constitution's unqualified command on the grounds that that command imposes a merely "procedural requirement."

ARGUMENT

I

PETITIONERS' GUARANTEE CLAUSE CLAIM IS JUSTICIABLE

The United States Constitution guarantees to every state and its citizens a republican form of government. U.S. Const. art. IV, § 4. The Guarantee Clause protects the rights of citizens to establish legitimate state constitutional rules and to have their state governments follow those rules. *Sugarman v. Dougal*, 413 U.S. 634, 648 (1973); *United States v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *In re Initiative Petition No. 348*,

820 P.2d 772, 780 (Okla. 1991). Although this Court has sometimes interpreted the Guarantee Clause as an entirely political matter, this is one of the rare cases in which the Court can and should enforce the guarantee to protect the citizens and the Constitution of Nevada.

A. Early Cases Examined the Merits of Republican Guarantee Claims

In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), this Court held that the Guarantee Clause did not allow the Court to decide which of two rival governments of Rhode Island was legitimate, because when "the people of the State . . . alter and change their form of government," it is for Congress to determine whether their doing so violates the Guarantee Clause. *Id.* at 47. Although *Luther* was later read to absolutely limit enforcement of the Guarantee Clause to the political branches, it did no such thing. *See Colegrove v. Green*, 328 U.S. 549, 556 (1946).

In the years following *Luther*, this Court "addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." *New York v. United States*, 505 U.S. 144, 184 (1992). *See, e.g., Minor v. Happersett*, 88 U.S. 162, 175-76 (1874); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897); *Michigan v. Lowrey*, 199 U.S. 233, 239 (1905). The Court addressed the merits of Republican Guarantee Clause claims at length in *Duncan v. McCall*, 139 U.S. 449 (1891), and in *Taylor v. Beckham*, 178 U.S. 548 (1900), and again did not dismiss the cases as nonjusticiable. Other courts also found Guarantee Clause arguments to be justiciable. *Kadderly v. Portland*, 74 P. 710, 719 (Or. 1903); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936).

Finally, in *New York*, this Court acknowledged that the *Colgrove* Court was wrong to categorize all Guarantee Clause arguments as nonjusticiable. 505 U.S. at 184-85. *New York* involved a federal law which essentially commanded states to

regulate radioactive waste disposal. *Id.* at 174-75. This federal law had three provisions, including a provision declaring that if a state refused to regulate the waste in the manner Congress set forth, the state was required to take title to it. *Id.* at 175. The state argued that all three provisions of the law violated several clauses of the Constitution, including the Tenth Amendment and the Republican Guarantee Clause. The Court found that the "take title" provision did violate the Tenth Amendment, *id.* at 177, so the Court did not find it necessary to resolve the Guarantee Clause claim against that provision. *Id.* at 183-84. But, the Court did address the merits of the Guarantee Clause claim against two other provisions:

> In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the "political question" doctrine. . . . This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable . . . . We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither [of the remaining provisions] . . . pose any realistic risk of altering the form or the method of functioning of New York's government.

Id. at 184-86.

New York strongly suggests that Guarantee Clause claims are justiciable in some limited circumstances: namely, when an act poses a "realistic risk" of altering the "method of functioning" of a state's government. That is precisely the situation presented here.

B. There Are Judicially Manageable Standards for Adjudicating a Republican Guarantee Claim

Two cases in particular set forth basic standards for weighing the merits of a Guarantee Clause claim. In *Duncan v. McCall*, 139 U.S. 449 (1891), this Court rejected an argument by a criminal defendant that the Clause prohibited his conviction under procedures not promulgated by the Texas Legislature. The Court did not dismiss the case as nonjusticiable, but held that because the state's "legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law," the Guarantee Clause was not violated. *Id.* at 462. Quoting Daniel Webster, *Duncan* indicated that the Clause would be violated if a state suddenly and undemocratically altered its form of government, especially with regard to voting provisions:

> the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule . . . . [T]he people limit themselves in regard . . . to certain forms of the conduct of elections . . . [and] our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes . . . . [T]he constitution and laws . . . [guarantee] the idea of results achieved by orderly action under the authority of existing governments . . . .

Id. at 461-62 (citation omitted).

The principle that the Clause protects the regular procedures of state law from sudden, internal, undemocratic alteration was reiterated in *Taylor v. Beckham*, 178 U.S. 548 (1900). That case involved a disputed gubernatorial election. The Court addressed the merits of the Guarantee Clause challenge, but rejected it because "[t]he procedure was in

accordance with the Constitution and laws of the state." *Id.* at 573. Since "the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by [the State's] fundamental law," and were "the result of the Constitution and laws under which they lived and by which they were bound," *id.* at 580, the Court found no violation.

Here, however, the state is not operating by the orderly and settled methods prescribed by its fundamental law: its constitution. Instead, there has been a sudden change in the method of functioning of Nevada government. That change was wrought by an undemocratic process—that is, through a judicial opinion—and it immediately deprived citizens of the participatory rights they formerly enjoyed under their government's constitutional rules, because the citizens whose representatives could have forestalled the tax hike have now been deprived of the effectiveness of their votes. *Cf. Raines v. Byrd*, 521 U.S. 811, 823 (1997) ("[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.")

In *New York*, this Court said that a Guarantee Clause challenge could succeed where an undemocratic change in state law poses a "realistic risk of altering the form or the method of functioning of [a state]'s government." 505 U.S. at 186. Since then, several lower courts have addressed Guarantee Clause challenges. *See, e.g., Vazquez*, 145 F.3d at 77 (state's decision to join federal government in lawsuit did not alter form of state government); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (Clause would be violated if authorities act to "alter[] the form or the method of functioning of [the state's] government."); *Kelley v. United States*, 69 F.3d 1503, 1510-11 (10th Cir. 1995) (Guarantee Clause prohibits "a fundamental restructuring of the form of state governments" and protects

citizens' right to "structure their . . . government[] as they see fit."); *In re Initiative Petition*, 820 P.2d at 780 (same); *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997) (same).

Thus, both early cases and *New York* provide a judicially manageable standard for determining when a state action[3] violates the Guarantee Clause. *New York* and its progeny essentially restate the early Guarantee Clause test: **where a sudden and undemocratic shift in the operations of government immediately alters the state's Constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional requirements, a Republican Guarantee challenge is appropriate.** *See Taylor*, 178 U.S. at 580.

C. This Case Does Not Involve a Political Question

Further, because Nevada law makes the mechanism for passing tax bills plainly and easily discernible—simply counting the number that constitutes a two-thirds vote—this case involves no complicated political value judgments which would make the political branches more appropriate for redress. This Court can easily redress Petitioners' injury by vacating the decision below. Neither does this case present a political question. Although *Luther* is often cited for the proposition that the Guarantee Clause is always nonjusticiable, this is incorrect. The *Luther* Court dismissed the claim as a political question because it suffered from defects not present here: the Court feared that a judicial ruling could create conflict with other federal branches. *See New York*, 505 U.S. at 184. But where, as here, there is no reason that the judiciary is ill-suited to enforce the guarantee, or any likelihood that the other branches of the federal government will do a superior job protecting the

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[3] *New York* involved a federal law alleged to violate the Guarantee Clause. But *Taylor*, *Duncan*, and other earlier sources, including *The Federalist*, make clear that the Clause was primarily intended to prevent state usurpations.

rights concerned, there is less reason to regard the Clause as nonjusticiable. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 853 (1994). Indeed, this Court has acknowledged that the Guarantee Clause does not always involve political questions; only where judicially manageable standards for reaching a legal conclusion are absent is the matter unfit for judicial resolution. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). That is not the situation here.

Baker v. Carr sets forth the elements of a political question. 369 U.S. 186, 217 (1962). None of these elements are present here. This case does not seek to second-guess the executive or legislative branches; rather a judicial resolution is appropriate because the judiciary caused the injury. The standards for resolving this dispute have been explained in *Taylor*, *Duncan*, and other cases; nonjudicial discretion is not called for, since the Court is not asked to make a policy determination, but simply to prevent the violation of Petitioners' federally protected participatory rights; the Court can easily undertake independent resolution without casting disrespect on coordinate branches of the federal government—indeed, no other branch is competent to deal with the situation presented here. There is no need for adherence to a political decision as would be present in a case involving foreign policy; finally, no other department has spoken on this issue, thus potential embarrassment from multifarious pronouncements is unlikely.

This case would not engage the judiciary in "matters purely political," as in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 141 (1912). There, the Court rejected a Guarantee Clause challenge because it would have required the Court "to disregard the existence in fact of the state . . . and practically award a decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government." *Id.* at 142. Nothing nearly so

extreme is sought here. This case presents no issue of political balancing or value judgments, nor would this case require the Court to "substitute its judgment as to a matter purely political for the judgment of Congress . . . and thus overthrow the Constitution . . . ." *Id.* In fact, this case is the opposite of *Pacific States Telephone.* In that case, a tax was imposed by an initiative, which the company argued violated the Guarantee Clause. The Court held that it would be fundamentally un-republican to "authorize the judiciary to substitute its judgment" for the judgment of the people or their legislature. *Id.* at 142. Petitioners here, however, ask only that this Court *protect* the judgment of the people when they passed the initiative creating the two-thirds rule. This case therefore involves a plain legal question: may the Nevada Supreme Court authorize the Legislature to regard a bill as "passed" with a bare majority when the state constitution requires a two-thirds vote?

II

RESPONDENTS HAVE DEPRIVED PETITIONERS OF THEIR RIGHT TO A REPUBLICAN FORM OF GOVERNMENT

In *New York*, this Court suggested that the Republican Guarantee Clause protects the citizens' rights to run their own governments and to hold state officials accountable. 505 U.S. at 186. These rights were violated here. The state Legislature has deemed a bill "passed" by a simple majority where the plain language of the state constitution requires a two-thirds vote of both houses of the Legislature. Doing so violates the Petitioners' federally protected right to have their votes count, an essential component of a republican government. *Raines*, 521 U.S. at 823.

Moreover, the state supreme court has ordered the Legislature to proceed in violation of the unambiguous command of the state constitution, on the grounds that the constitution sets forth a mere "process requirement by which

legislative action is accomplished," and which must "yield" when a bill is *really* important. *Guinn I*, 71 P.3d at 1276. There is no limit to the breadth of this "exception" and it swallows the two-thirds requirement altogether. The Nevada Supreme Court has therefore effectively amended the state constitution, eliminating the two-thirds clause by "suspend[ing] the supermajority rule in favor of a vote by a legislative majority." *Guinn II*, 76 P.3d at 32. Such an extra-constitutional "amendment" violates the Republican Guarantee Clause, and the blessing of a state's supreme court does not permit the state to violate the federal constitutional standard. *See Bush v. Gore*, 531 U.S. 98, 107 (2000) (*per curiam*) (federal courts may intervene where "[t]he State Supreme Court [has] ratified [unconstitutional acts]").

If the state supreme court can simply waive the two-thirds requirement on the grounds that it interferes with state funding needs, there is no reason why the court could not also waive the requirement of majority rule (Nev. Const. Art. IV, § 18, cl. 1), since that, too, is a "mere" procedural requirement. A state's constitution is written precisely to set forth the "process" by which legislation is created.

This is a clear instance of changing the rules in the middle of the game. Regardless of the wisdom of the two-thirds requirement adopted by the people of Nevada, that requirement is part of the state constitution, and citizens have a right to have that requirement followed. Normally, that right is protected by other branches of government through the checks and balances system, or appeal to the state's nonpolitical branch. But here, the nonpolitical branch[4] has blessed the political branches' violation of the state's clear constitutional mandate, in the process diluting the Petitioners' votes below the weight

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[4] While judges in Nevada are accountable to the people by recall and reelection, the Nevada judiciary remains a nonpolitical branch. *See Nevada Judges Ass'n v. Lau*, 910 P.2d 898, 901-02 (Nev. 1996).

required by state law. *Cf. Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote . . . ."). Nevada is no longer functioning by the "orderly and settled methods prescribed by its fundamental law," *Taylor*, 178 U.S. at 580, or following "the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes." *Duncan*, 139 U.S. at 462. Nevadans must look to this Court to protect their form of government. Since no reason exists for deferring to the political branches of the federal government, this Court should fulfill the guarantee.

III

THIS CASE DOES NOT THREATEN FEDERALISM

Although states are largely free to set their own procedures and interpret their own laws, federal courts will intervene where federal rights are at issue. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 291 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958). This is even true where the violation is done with permission of the state's high court. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 356-57, 361 (1964); *Gore*, 531 U.S. at 114-15 (Rehnquist, C.J., Scalia, Thomas, JJ., concurring). Further, because the circumstances in which the Guarantee Clause is violated are extraordinary and rare, finding this as justiciable will not seriously threaten the states' legitimate autonomy.

A. This Case Does Not Involve Merely a State Court's Interpretation of State Law

The Nevada Supreme Court couched its decision in terms of a state court interpreting that state's laws. But in fact this case presents something different. The state supreme court, at the Governor's request, has essentially changed the way laws are passed, in this particular instance. It has *not* declared the two-thirds provision unconstitutional, but has simply commanded that it "yield" because the Governor had limited

the issues that the Legislature could discuss at the special session. *See Guinn II*, 76 P.3d at 32-33 ("Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties."). Normally, even a clearly wrong state-based decision would have no federal remedy. But when that decision intrudes on federally protected rights of due process, equal protection, and the right to a guarantee of the state's republican government, it is appropriate for federal courts to enforce those federal rights.

In *Bouie*, this Court reversed a trespassing conviction handed out to civil rights protestors, even though the South Carolina Supreme Court had affirmed that conviction. The state court had, for the first time, held that the state's trespassing law prohibited "not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." 378 U.S. at 350. In its decision reversing the conviction, this Court noted that such an interpretation of the law was entirely new and unprecedented, and was a thinly-veiled attempt by the South Carolina Supreme Court to violate the Fourteenth Amendment "by judicial construction of the statute . . . ." *Id.* at 362. This "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" violated the Due Process Clause. *Id.* at 352; *see also NAACP*, 357 U.S. at 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

Petitioners and Amici are *not* arguing that the Guarantee Clause is automatically implicated whenever a court strikes down an initiative. But this case involves an unprecedented situation, in which a state's legitimately enacted constitutional framework has been altered to attain a political end, rather than

to correct the political branches' failure to protect individual liberty. This sudden and undemocratic shift in the operations of government immediately alters the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional rules. As such, it undermines the republican framework without accomplishing the essentially republican goal of safeguarding individual rights against majority overreaching.

B. Addressing the Merits of Guarantee Clause Claims Will Not Result in Federal Interference with State Interpretations of Their Own Law

New York and other Guarantee Clause cases provide a judicially manageable standard for determining when citizens' right to have their state constitutions followed has been violated. Yet these cases have not resulted in a flood of litigation, and are not likely to. In the eleven years since *New York*, none of the cases relying on it have found a challenged state action to violate the Clause. But where a violation does occur, where the mechanism of checks and balances normally relied upon to prevent violations of the state constitution breaks down, and where no political question is presented, citizens must rely on this Court to enforce their federal right to have their state constitutions followed.

For this Court to enforce the Guarantee Clause would not make federal courts censors of every state decision. In most cases, state policy decisions and state court interpretations of state law will not be subject to federal interference, because they will not implicate federal rights. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). When state courts do strike down state constitutional provisions for violating the federal Constitution, this Court can exercise the supervisory role it already exercises now. And when state courts strike down laws for valid state-based reasons—for violating the "single subject rule," for

example—the Guarantee Clause will not be violated because in those cases, the state courts will be operating "in accordance with legal and authentic modes." *Duncan*, 139 U.S. at 462.

Further, enforcing the guarantee would not prohibit citizens from amending their state constitutions. *Luther*, 48 U.S. (7 How.) at 47. As Alexander Hamilton explained, the Clause presents "no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode." *The Federalist* No. 21, at 140 (Clinton Rossiter ed., 1961). Rather, it prevents the sudden undermining of state constitutions:

> [Without a guarantee] Usurpation may rear its crest in each State and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret . . . A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.

Id. Indeed, cases which have adjudicated Guarantee Clause claims have routinely held that the people may legitimately change their forms of government in orderly and democratic ways. *In re Initiative Petition*, 820 P.2d at 780; *Kelley*, 69 F.3d at 1510-11. Granting the petition would, therefore, not undermine democratic control of state government, but would strengthen it. *See Gore*, 531 U.S. at 115 ([R]eview of a state court's decision "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility . . . .").

Enforcing the Guarantee Clause in this case therefore would not make every state court decision striking down a state

law into a federal violation of the Guarantee Clause. But where, as here, the non political branch gives the Legislature permission to ignore the state constitution, the Guarantee Clause does protect the citizens' right to have their constitution followed.

C. This Court Should Guarantee to Nevadans Their Right to a Republican Form of Government

The decision below is a threat not only to Nevadans, but also to the citizens of all states. Shortly after the court below ruled, officials in both California and Arkansas indicated their intent to use similar tactics to avoid constitutional spending limitations. *See* Stephen Deere, *Newbern, Seen as Meticulous*, Arkansas Democrat-Gazette, Feb. 8, 2004 (2004 WL 57534921).

But even if no other state were concerned, the people of Nevada are suffering a continuing injury. Since the state supreme court refused to vacate its earlier decision as moot, the decision remains on the books and may be used in any future legislative session to escape the two-thirds requirement by fiat. *See also Sets Aside*, *supra*, at 975 ("[*Guinn*] . . . jeopardizes the integrity of procedures that are central to the separation of powers in a free republic").

The Nevada Constitution is rarely amended, and the rules for amending its Constitution by initiative are quite burdensome. Yet the two-thirds provision succeeded on those rules. The people of Nevada have a right to have that provision followed by their state government. That right is guaranteed to all citizens by the federal system. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). Where this Court is the citizens' sole protector against the threat of a lawless state government, it must intercede to protect the citizens' rights.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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Respectfully submitted,

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